IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

NAUN EDGUARDO ALVAREZ,
Appellant.

No. 2 CA-CR 2016-0242
Filed May 31, 2017

Appeal from the Superior Court in Pima County
No. CR20152028001
The Honorable Kenneth Lee, Judge
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

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

Joel Feinman, Pima County Public Defender
By Sarah L. Mayhew, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 Following a jury trial, Naun Alvarez was convicted of two counts of aggravated assault with a deadly weapon. On appeal, he challenges the trial court's denial of his motion to sever the counts and the admission of certain evidence at trial. Finding no reversible error, we affirm the convictions and sentences.

Factual and Procedural Background

¶2 After Alvarez was charged with two counts of aggravated assault with a deadly weapon, one against civilian N.P. and one against a peace officer, he filed a motion to sever and a motion in limine to preclude Rule 404(b) evidence. The trial court heard arguments on both motions and subsequently denied them. On the morning of the trial, before jury selection, Alvarez renewed his severance motion and the court again denied it. After a two-day trial, the jury found him guilty on both counts of aggravated assault. Alvarez was sentenced to concurrent, presumptive terms totaling 10.5 years. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Motion to Sever

¶3 Rule 13.4(c), Ariz. R. Crim. P., states that a defendant must make a motion to sever before trial and then renew the motion "during trial at or before the close of the evidence." "Severance is waived if a proper motion is not timely made and renewed." Ariz. R. Crim. P. 13.4(c). Although we generally review the denial of a severance motion for an abuse of discretion, our review is limited to fundamental error when the defendant has failed to renew the motion during trial. *State v. Prion*, 203 Ariz. 157, ¶ 28, 52 P.3d 189, 194 (2002);

State v. Goudeau, 239 Ariz. 421, ¶ 54, 372 P.3d 945, 967 (2016). Alvarez concedes he did not renew his severance motion during trial and we review the denial of his motion for fundamental error only.

¶4 Fundamental error is that "going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial." *State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005), *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). A defendant will only prevail under the fundamental error standard of review by "establish[ing] both that fundamental error exists and that the error in his case caused him prejudice." *Id.* ¶ 20.

¶5 Rule 13.3(a), Ariz. R. Crim. P., permits the joinder of multiples offenses in a single indictment "if they: (1) [a]re of the same or similar character; or (2) [a]re based on the same conduct or are otherwise connected together in their commission; or (3) [a]re alleged to have been a part of a common scheme or plan." Alvarez argues on appeal, as he did below, the two counts were only properly joined under 13.3(a)(1) and therefore he was entitled to severance as of right under Rule 13.4(b), Ariz. R. Crim. P. *See* Ariz. R. Crim. P. 13.4(b) ("The defendant shall be entitled as of right to sever offenses joined only by virtue of Rule 13.3(a)(1), unless evidence of the other offense or offenses would be admissible under applicable rules of evidence if the offenses were tried separately."). As the state has argued, however, the two counts were also properly joined as being "otherwise connected together in their commission" under 13.3(a)(2).

¶6 Count One of the indictment charged Alvarez with committing aggravated assault against N.P. The state alleged that N.P. saw Alvarez punch his "girlfriend" outside N.P.'s residence and that N.P. intervened. Alvarez produced a handgun, cocked it, and pointed it at N.P. as she ran back into her residence. N.P. called the police, who found Alvarez and the girl walking in a nearby park. When an officer approached him, Alvarez fled, subsequently encountering Officer M.H. in a patrol car and pointing the gun at him through the windshield as they crossed paths.

¶7 The trial court did not err in concluding the initial assault, causing the victim to immediately call the police, and the second assault against a responding police officer, committed shortly thereafter with the same weapon, are "otherwise connected together in their commission" and were properly joined under 13.3(a)(2). *See State v. Prince*, 204 Ariz. 156, ¶¶ 1, 3, 15, 61 P.3d 450, 451-53 (2003) (murder of one victim and attempted murder of another close in time properly joined under 13.3(a)(2)). Furthermore, it was not necessary to sever the two counts "to promote a fair determination of [Alvarez's] guilt or innocence" under Rule 13.4(a) because the jury was properly instructed to consider the offenses separately, as discussed below. *Id.* ¶¶ 16-17; *see also State v. Comer*, 165 Ariz. 413, 419, 799 P.2d 333, 339 (1990).

¶8 Finally, even if the trial court erred in denying Alvarez's severance motion, reversal would only be warranted under the fundamental error standard of review if Alvarez could demonstrate joining the counts for trial prejudiced him. *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. The court's final instructions to the jury included: "Each 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," and, "[T]he state must prove every part of each charge beyond a reasonable doubt." A defendant is not prejudiced by a failure to sever counts when the jury is so instructed. *See Prince*, 204 Ariz. 156, ¶ 17, 61 P.3d at 454 (defendant not prejudiced by denial of severance "where the jury is instructed to consider each offense separately and advised that each must be proven beyond a reasonable doubt"); *Comer*, 165 Ariz. at 418-19, 799 P.2d at 338-39 (same; defendant convicted of all counts charged); *State v. Martinez-Villareal*, 145 Ariz. 441, 443, 446, 702 P.2d 670, 672, 675 (1985) (same).

Statements Regarding Alvarez's "Girlfriend"

¶9 Alvarez next argues the trial court erred in allowing N.P. to testify her encounter with Alvarez began when she saw him punch

his "girlfriend" in the face.[1] We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Hargrave*, 225 Ariz. 1, ¶ 21, 234 P.3d 569, 577 (2010). Rule 404(b), Ariz. R. Evid., provides that "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person . . . [but] may, however, be admissible for other purposes, such as proof of motive . . . [or] intent." The rule's list of "other purposes . . . is not exclusive; if evidence is relevant for any purpose other than that of showing the defendant's criminal propensities, it is admissible even though it refers to his prior bad acts." *State v. Jeffers*, 135 Ariz. 404, 417, 661 P.2d 1105, 1118 (1983).

¶10 The state argues, and the trial court appears to have found, N.P.'s testimony was admissible under 404(b) to show Alvarez's intent in and motive for pointing the gun at N.P. and to show N.P.'s fear was reasonable. The court did not abuse its discretion in finding these reasons warranted admitting evidence of other acts under 404(b) in this case. Moreover, the testimony also gave context for N.P.'s entire interaction with Alvarez. Contrary to Alvarez's argument on appeal, our supreme court in *State v. Ferrero*, 229 Ariz. 239, ¶ 23, 274 P.3d 509, 514 (2012), reaffirmed that 404(b) evidence may be admitted to "complete[] the story" of a crime "to avoid confusing the jury." A jury hearing that a conflict between two strangers concluded with one pointing a gun at the other reasonably would want to understand how the altercation began.

¶11 Evidence of other acts qualifying under 404(b) nevertheless may be excluded under Rule 403, Ariz. R. Evid., "if its probative value is substantially outweighed by a danger of . . . unfair prejudice . . . or needlessly presenting cumulative evidence." "Unfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror." *State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). "Not all harmful evidence . . . is unfairly prejudicial." *Id.* at 545-46,

---

[1]Alvarez attempts to characterize this as an uncharged act of "domestic violence." He does not, however, identify any authority suggesting references to the victim as his "girlfriend" should affect our analysis, nor are we aware of any.

931 P.2d at 1055-56. Alvarez specifically referenced Rule 403 in his motion in limine and during the motions hearing, although the trial court did not explicitly discuss the balancing test in allowing the evidence. In any event, the trial court could implicitly have found, as do we, the probative value of N.P.'s testimony about how she came into contact with Alvarez upon seeing him punch the other girl was not substantially outweighed by a danger of unfair prejudice. *Cf. State v. Waller*, 235 Ariz. 479, ¶ 40, 333 P.3d 806, 817 (App. 2014) ("A defendant who fails to request express findings concerning a Rule 403 determination waives any allegation on appeal that the court erred by not making such findings.").

¶12 We also reject Alvarez's argument that the admission of N.P.'s call to police repeating her testimony "was cumulative, highly prejudicial and repeated a graphic description of the uncharged act of violence." The recorded 9-1-1 call was relevant for the same reasons as N.P.'s in-court testimony, and we cannot say it was so needlessly cumulative that the trial court abused its discretion by allowing the recording to be admitted at trial. *See Jeffers*, 135 Ariz. at 417, 661 P.2d at 1118 ("Evidence which tests, sustains, or impeaches the credibility or character of a witness is generally admissible.").

¶13 Finally, Alvarez's assertion that the trial court erred by not giving an unrequested limiting instruction on the proper use of N.P.'s testimony is without merit. Alvarez's citations concerning erroneous jury instructions are inapposite because he has not argued any instruction given was wrong. Additionally, he concedes he did not request a limiting instruction below, which restricts our review to fundamental error. *See State v. Gendron*, 168 Ariz. 153, 154, 812 P.2d 626, 627 (1991).

¶14 As noted earlier, "[a]lthough evidence of other acts is not allowed to show that a defendant acted in conformity with them, Rule 404(b), Ariz. R. Evid., a trial court is not required, sua sponte, to give a limiting instruction on such evidence." *State v. Miles*, 211 Ariz. 475, ¶ 31, 123 P.3d 669, 677 (App. 2005). Here, N.P.'s testimony about Alvarez's initial bad act constituted a small portion of her testimony, and we cannot say the trial court's not giving a sua sponte limiting instruction took from Alvarez "a right essential to his defense" such

that he "could not possibly have received a fair trial." *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting Hunter*, 142 Ariz. at 90, 688 P.2d at 982. We find no fundamental error.

Patrol Car Dash-Cam Video

¶15 Alvarez's opening brief makes a cursory mention of a slowed-down dash-cam video from Officer M.H.'s patrol car that was introduced at trial. Although both the opening and reply briefs conclude with a request that "the altered dash-cam video be precluded on retrial," Alvarez's only other statement on appeal regarding the video is that the trial court "admitted the altered video over [Alvarez]'s objection that the video lacked foundation because it inaccurately depicted the actual events." During trial, the state introduced the full-length, regular-speed video from the patrol car dash-cam and, over Alvarez's objection, a clip of the dash-cam video that showed just the officer's encounter with Alvarez in slow motion.

¶16 Rule 31.13(c)(1)(vi), Ariz. R. Crim. P., provides that the appellant's brief "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on." Mere recitation of the trial objection without argument is insufficient; therefore, the issue of the altered video is waived. *See State v. Sanchez*, 200 Ariz. 163, ¶ 8, 24 P.3d 610, 613 (App. 2001); *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) ("reiterat[ing]" objections on appeal without "sufficient argument" waives claim). In any event, the trial court did not abuse its discretion by admitting the slow-motion video clip along with the full-length, regular-speed video. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 17, 186 P.3d 33, 37 (App. 2008) ("A video recording or photograph . . . need not be perfectly accurate."); *Commonwealth v. Cash*, 137 A.3d 1262, 1277 (Pa. 2016) (trial court did not abuse discretion by admitting slow-motion surveillance video).

Disposition

¶17 For all of the reasons discussed above, Alvarez's convictions and sentences are affirmed.