IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DEREK R. ANDREWS,
Appellant.

No. 2 CA-CR 2019-0192
Filed September 25, 2020

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20184555001
The Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Michael T. O'Toole, Chief Counsel
By Alexander M. Taber, Assistant Attorney General, Tucson
Counsel for Appellee

Robert A. Kerry, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Derek Andrews was convicted of sexual exploitation of a minor under fifteen (count one), aggravated assault with a deadly weapon (count two), intentional or knowing child abuse under circumstances likely to cause serious physical injury or death (count three), and eleven additional counts of sexual exploitation of a minor involving child pornography (counts four through fourteen). The trial court sentenced him to consecutive and concurrent prison terms totaling 137 years. On appeal, Andrews argues the court erred in denying his motion to sever counts two and three from the other counts, and he was unfairly prejudiced as a result. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts and all reasonable inferences in the light most favorable to affirming Andrews's convictions. *See State v. Molina*, 211 Ariz. 130, ¶ 2 (App. 2005). In October 2018, Andrews's then-girlfriend, C.G., discovered a video of Andrews on his cell phone that showed him ejaculating on their three-year-old daughter's face. After C.G. confronted him about the video, Andrews pointed a handgun at her and their daughter, threatening to disengage the safety. As the confrontation continued, Andrews pulled back and released the gun's slide, expelling a round.

¶3 After Andrews eventually put down the gun, C.G. left their home with their daughter and reported Andrews to the police. A detective arrested Andrews and obtained a warrant to search his phone. Upon searching the phone, the detective did not find the video C.G. had described, but Andrews admitted that he had deleted it. The detective did, however, find eleven other videos on the phone depicting child pornography.

¶4 A grand jury indicted Andrews, and he was convicted as charged and sentenced as described above. We have jurisdiction over

Andrews's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Denial of Motion to Sever

¶5 Andrews argues the trial court erred in denying his motion to sever counts two and three from counts one and four through fourteen. He contends the "shocking" evidence relating to counts one and four through fourteen unfairly prejudiced him in counts two and three, and he asserts that evidence would have been inadmissible in a separate trial of counts two and three. He maintains that joinder of all the counts effectively deprived him of his right to testify about counts two and three while remaining silent on the remaining counts. We review a court's denial of a motion to sever for abuse of discretion, *see State v. Murray*, 184 Ariz. 9, 25 (1995), and will reverse "only if the defendant can show 'compelling prejudice against which the trial court was unable to protect,'" *State v. Burns*, 237 Ariz. 1, ¶ 29 (2015) (quoting *Murray*, 184 Ariz. at 25). We review constitutional issues de novo. *State v. Moody*, 208 Ariz. 424, ¶ 62 (2004).

¶6 Offenses may be joined as separate counts in the same indictment if they "are of the same or similar character," "are based on the same conduct or are otherwise connected together in their commission," or "are alleged to have been a part of a common scheme or plan." Ariz. R. Crim. P. 13.3(a). A trial court must nonetheless sever counts "if necessary to promote a fair determination of any defendant's guilt or innocence of any offense." Ariz. R. Crim. P. 13.4(a). Severance is not required when the evidence on which the claim for severance is based would be admissible in a separate trial, *see State v. Van Winkle*, 186 Ariz. 336, 340 (1996), including when offenses are joined merely because they are of the same or similar character, *see* Ariz. R. Crim. P. 13.4(b).[1]

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[1]*Van Winkle* involves the concept of "rub-off," which occurs when a jury's impression of a defendant is negatively influenced by evidence that is admitted against a co-defendant. 186 Ariz. at 340. The state contends that rub-off, as the term has been commonly used in our jurisprudence, does not apply in cases involving one defendant facing joined counts, and it objects to Andrews's use of cases involving rub-off to support his claims. The rub-off doctrine does not always neatly apply to severance of counts rather than defendants. *See State v. Atwood*, 171 Ariz. 576, 613 (1992) (declining to apply rub-off doctrine to severance of counts), *overruled on other grounds by State v. Nordstrom*, 200 Ariz. 229, ¶ 25 (2001). But some core principles apply to both situations, and in appropriate circumstances our

¶7 Here, evidence of count one would not have been admissible in a separate trial to merely "complete[] the story" of counts two and three, as the state contends.[2] The state cites *State v. Via*, 146 Ariz. 108, 115 (1985), and *State v. Johnson*, 116 Ariz. 399, 400 (1977), for this proposition, but our supreme court has since clarified that evidence is not admissible "merely to 'complete the story' or because evidence 'arises out of the same transaction or course of events' as the charged act." *State v. Ferrero*, 229 Ariz. 239, ¶ 20 (2012). Rather, a defendant's other crime, act, or wrong is admissible to complete the story of the charged crime only if it "(1) directly proves the charged act, or (2) is performed contemporaneously with and directly

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supreme court has applied rub-off case law to severance of counts against one defendant. *See, e.g.*, *State v. Ives*, 187 Ariz. 102, 106 (1996) (citing *Van Winkle*, 186 Ariz. at 340). We do the same here, observing that nothing is gained by a separate trial if the complained-of evidence would be admissible in the separate trial, whether the evidence would have been offered against a co-defendant or to support a joined count.

[2]We reject the state's unsupported contention that "all of the counts were properly joined via their interrelated connection to count [one]," in which it suggests that counts two and three were properly joined with counts four through fourteen because evidence of counts four through fourteen would have been admissible in a separate trial on count one, and evidence of count one would have been admissible in a separate trial on counts two and three. Because counts four through fourteen were properly joined solely on the basis of their similar character to count one, Andrews would have been entitled to severance of counts two and three from counts four through fourteen unless the evidence of counts four through fourteen would be admissible in a separate trial on counts two and three. *See* Ariz. R. Crim. P. 13.3(a)(1), 13.4(b).

The rules did not similarly require evidence of count one to be admissible in a separate trial on counts two and three, however, because count one was joined based on its connection to the commission of counts two and three. *See* Ariz. R. Crim. P. 13.3(a)(2), 13.4(b); *State v. Williams*, 183 Ariz. 368, 375 (1995) (counts properly joined under Rule 13.3(a)(2) when evidence in one count showed that defendant "sought to suppress evidence adversely affecting him" in another). But because we conclude below that count one evidence would have been admissible in a separate trial on counts two and three, and denial of severance from count one was proper on that basis, *see Van Winkle*, 186 Ariz. at 340, we need not determine if the denial of severance was proper as to count one for a different reason.

facilitates commission of the charged act." *Id.* Neither applies here; evidence that Andrews created the video in count one and possessed the videos in counts four through fourteen did not directly prove that Andrews threatened C.G. or their daughter with a gun, and the threats did not facilitate commission of the offenses in those counts, because Andrews had already committed them.

¶8 As the trial court concluded, however, the evidence of counts one and four through fourteen would have been admissible in a separate trial to show motive for the aggravated assault in count two and child abuse in count three. The court noted that "the State could prove that Counts Two and Three were committed as a result of [C.G.'s], I guess, discovery of the evidence of Count One and the potential discovery of the evidence of [counts] Four through Fourteen on the defendant's cell phone." We agree with the court's reasoning. And Andrews concedes that the evidence of counts one and four through fourteen shows a motive to commit counts two and three. Indeed, Andrews's characterization of the facts of counts one and four through fourteen as repellent and shocking is suggestive of how he would have reacted to C.G's discovery of the videos and, therefore, was relevant to counts two and three. Relevant evidence is generally admissible, *see* Ariz. R. Evid. 402, and even though a defendant's other acts are not generally admissible for all purposes, they are admissible to show motive, *see* Ariz. R. Evid. 404(b).

¶9 We reject Andrews's contention that the evidence of counts one and four through fourteen would have been inadmissible in a separate trial under Rule 403, Ariz. R. Evid. Relevant evidence is inadmissible under Rule 403 only when its probative value is "substantially outweighed" by the danger of unfair prejudice. Andrews faced a high risk of prosecution and lengthy incarceration for the acts underlying counts one and four through fourteen if C.G. reported him to police, and therefore evidence of those acts showed a powerful motive to commit counts two and three. Moreover, if Andrews were to have testified in a separate trial and denied that he had committed counts two and three—as he asserts he would have—the state likely would have countered that testimony and reinforced C.G.'s testimony with the evidence supporting those counts. Given the value of the evidence of counts one and four through fourteen in proving counts two and three, the trial court did not err in concluding that the evidence would not have been excluded under Rule 403 in a separate trial. *See State v. Togar*, 248 Ariz. 567, ¶ 23 (App. 2020) (court has broad discretion under Rule 403).

¶10 Andrews nevertheless contends that the facts of counts one and four through fourteen were "unnecessary to prove" the offenses in counts two and three because motive was not an element of either offense. But our supreme court has upheld denials of motions to sever when motive for the counts to be severed is shown by the evidence for other counts. *See, e.g.*, *State v. Johnson*, 212 Ariz. 425, ¶¶ 12, 14 (2006) (evidence of gang involvement supporting one count admissible to show motive to commit offenses in other counts); *State v. McCall*, 139 Ariz. 147, 152-53 (1983) (defendant's participation with others in scheme to "take over" illegal drug enterprise admissible to show motive in murder). The relevant consideration in determining whether certain counts must be severed is whether evidence of the counts would be admissible in a separate trial on the other, not whether it would be necessary. *See* Ariz. R. Crim. P. 13.4(b); *Van Winkle*, 186 Ariz. at 340.

¶11 Arguably, the evidence for counts four through fourteen did not show motive as strongly as the evidence for count one because, even though Andrews knew the other videos were on his phone, C.G. had not discovered those videos and thus did not confront Andrews about them. Thus, in a separate trial on counts two and three, the trial court may have had discretion to exclude evidence of counts four through fourteen under Rule 403 if it determined that evidence was merely cumulative of the similar-in-character evidence of count one. But even assuming the court were to exclude evidence of counts four through fourteen in a separate trial on counts two and three, any prejudice to Andrews from the failure to sever those counts was minimal. The evidence of count one, which would have been admitted in any event, was not only similar in character to the evidence of counts four through fourteen but also carried a greater potential to repulse the jury. Unlike the evidence of counts four through fourteen, which showed that Andrews had possessed child pornography videos, Andrews had created the count-one video which showed him engaging in depraved sexual conduct towards his own daughter. *Cf. State v. Herrera*, 232 Ariz. 536, ¶ 30 (App. 2013) (no error in admitting other-act evidence "less inflammatory" than direct evidence of charged act).

¶12 Moreover, the parties had stipulated to written descriptions of the contents of the child pornography videos in counts four through fourteen, and the videos were not shown to the jury, reducing the risk of unfair prejudice. *See State v. Coghill*, 216 Ariz. 578, ¶ 19 (App. 2007) ("[O]ther-act evidence 'can be narrowed or limited to protect both parties by minimizing its potential for unfair prejudice while preserving its probative value.'" (quoting *State v. Salazar*, 181 Ariz. 87, 92 (App. 1994))). And the trial court properly mitigated the risk of unfair prejudice through

a limiting instruction, which informed the jury that it must consider all counts separately and that to find Andrews guilty on any count, it must find guilt for that count proven beyond a reasonable doubt. *See State v. Prince*, 204 Ariz. 156, ¶ 17 (2003) (defendant not prejudiced by denial of severance when jury instructed to consider each offense separately and advised that each must be proven beyond a reasonable doubt); *State v. Peraza*, 239 Ariz. 140, ¶¶ 23-24 (App. 2016) (juries are presumed to follow instructions). In sum, we conclude beyond a reasonable doubt that any conceivable error in failing to sever counts four through fourteen would have been harmless. *See State v. Granados*, 235 Ariz. 321, ¶ 35 (App. 2014) (erroneous admission of cumulative evidence harmless (citing *State v. Williams*, 133 Ariz. 220, 226 (1982))).

¶13 Finally, because the counts were properly joined, Andrews was fairly subject to cross-examination on evidence of any count if he testified. "Severance may be required when a defendant is prejudiced by the election to testify on all or none of the charges." *State v. Comer*, 165 Ariz. 413, 419 (1990) (citing *Cross v. United States*, 335 F.2d 987, 989 (D.C. Cir. 1964)). "[W]hen an accused wishes to testify on one but not the other of two joined offenses which are clearly distinct in time, place and evidence," he may be unfairly prejudiced because he is unable to independently weigh for each count the pros and cons of testifying. *Cross*, 335 F.2d at 989. But, "[w]here joinder of counts is proper, the [F]ifth [A]mendment is not violated by the fact that the defendant must elect to testify on all or none of the counts." *Comer*, 165 Ariz. at 419.[3] Here, the counts were properly

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[3]In *Comer*, our supreme court held that when a defendant seeks to sever counts because he claims prejudice from being forced to testify on all or none of the joined counts against him, "the defendant must make a showing that he has both important testimony to give on some counts and strong reasons for not testifying on others." 165 Ariz. at 419. It has since ruled that a defendant must actually testify to preserve error in the arguably analogous circumstance where a defendant challenged a ruling admitting impeachment evidence on the basis that it impermissibly interfered with his decision whether to testify. *See State v. Duran*, 233 Ariz. 310, ¶¶ 10, 20 (2013). It reasoned that "'an accused's decision whether to testify seldom turns on the resolution of one factor,' and therefore 'a reviewing court cannot assume that the adverse ruling motivated a defendant's decision not to testify.'" *Id.* ¶ 14 (quoting *Luce v. United States*, 469 U.S. 38, 42 (1984)). Here, Andrews did not testify, but the state has not argued that *Duran* applies. Therefore, we do not analyze whether Andrews needed to testify to preserve his claim of error.

joined, and the evidence was not distinct between the counts: the evidence for counts one and four through fourteen was admissible to prove counts two and three. Therefore, no constitutional violation arose from the fact that Andrews had to choose between testifying on all or none of the counts.

Disposition

¶14 For the foregoing reasons, Andrews's convictions and sentences are affirmed.