IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

PETER JOHN SCHMIDTFRANZ,
Appellant.

No. 2 CA-CR 2018-0231
Filed February 26, 2021

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NOT FOR PUBLICATION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. CR20154965001
The Honorable Casey F. McGinley, Judge

REVERSED AND REMANDED

COUNSEL

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MEMORANDUM DECISION

Presiding Judge Eppich authored the decision of the Court, in which Chief Judge Vásquez concurred and Judge Brearcliffe specially concurred.

E P P I C H, Presiding Judge:

¶1 Peter John Schmidtfranz appeals from his conviction and sentence for child abuse arguing the trial court erred by admitting evidence of specific instances of conduct of a third party and of his other acts and by allowing evidence that violated his right to be free from double jeopardy. For the reason stated below, we reverse Schmidtfranz's conviction and sentence and remand for a new trial.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict and resolve all reasonable inferences against Schmidtfranz. *See State v. Murray*, 247 Ariz. 583, ¶ 2 (App. 2019). In November 2015, Schmidtfranz returned home after a day out with M.J. and her two-year-old son, I.W.[1] Although I.W. was fussy, Schmidtfranz insisted on readying him for bed on his own so that I.W. could get accustomed to him.

¶3 While Schmidtfranz was alone with I.W., M.J. heard a sound that she thought was a door slam. She went to go check on I.W. and no longer heard him crying or fussing. Schmidtfranz said he had "got [I.W.] to calm down." Over Schmidtfranz's objections, M.J. took a bottle to I.W., whom she found in his crib, unresponsive and slumped in a fetal position, with his eyes partially open. When she picked him up, his head fell back and he made a gurgling sound.

¶4 Schmidtfranz left the house while M.J. was on the phone with 9-1-1. He returned after paramedics and police arrived and acted as if he had no idea what had happened. He told police that he had put gas in the car and had rushed home after M.J. called him.

¶5 The paramedics conducted a head-to-toe assessment of I.W., looking for external physical trauma, but found none. I.W. was rushed to

[1]Schmidtfranz and M.J. had been dating for approximately two months.

the hospital with a suspected traumatic brain injury (TBI). He had emergency surgery for a large acute subdural hematoma. He also presented with multiple complex retinal hemorrhages in his eyes.

¶6 A police investigation revealed that Child Protective Services had been called the week prior because I.W. had presented at daycare with a split-lip, black eye, scratches on his face, and bruises on his thigh and under his chin. After further investigation and interviews, police arrested Schmidtfranz and he was charged with one count of child abuse.

¶7 At his first trial, the jury could not reach a verdict, resulting in a mistrial. The state subsequently filed a notice of aggravating factors, Schmidtfranz was tried again, and convicted as charged. He was sentenced to a partially aggravated sentence of twenty years in prison. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Rule 405(b) Evidence

¶8 Schmidtfranz argues the trial court erred in allowing the jury to view video evidence of a patient M.J. conducting I.W.'s nighttime routine while I.W. was fussy.[2] At the first trial, the court admitted the evidence over Schmidtfranz's objection for lack of foundation. At a pretrial hearing before the second trial, Schmidtfranz argued this evidence was inadmissible because it was a "specific act portrayed in [a] video." The court admitted the evidence because "to the extent [Schmidtfranz] wishe[d] to present [M.J.] as a third-party culpability candidate . . . [to ask] about her abusive behavior or to establish that she is an abusive parent, it open[ed] the door for evidence that conflicts with that."[3]

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[2] We do not view the video evidence as other acts because Schmidtfranz argues that "Rules 401-403, rather than Rule 404(b), govern the admission of third-party culpability evidence." *See State v. Machado*, 226 Ariz. 281, ¶ 16.

[3] At Schmidtfranz's first trial, the video evidence was shown to the jury after M.J.'s daughter, K.J., testified that M.J. had hit her before. However at the second trial, the state presented the videos during direct examination of M.J. before Schmidtfranz had presented any evidence about M.J.'s "abusive behavior." The court's admissibility ruling was made before, and in anticipation of, the second trial. But Schmidtfranz did not

¶9 On appeal, Schmidtfranz agrees that the state was permitted to present evidence of M.J.'s character, but argues it was confined to reputation and opinion evidence. Ariz. R. Evid. 405(a). Schmidtfranz argues that the video evidence here represented specific instances of conduct and therefore M.J.'s character would have to be an "essential element of [the] charge, claim or defense" for the evidence to be admissible. Ariz. R. Evid. 405(b). He argues that because the success of his third-party culpability defense "did not entirely depend on his ability to show that [M.J.] was a bad or violent mother" her character is not an essential element. He further contends the video evidence's undue prejudice outweighed any probative value.

¶10 The state counters that the video was admissible because Schmidtfranz, by arguing M.J. was culpable for the abuse, necessarily put her parenting and patience at issue—making M.J.'s character an essential element of the defense and permitting rebuttal with a specific instance of conduct. *See* Ariz. R. Evid. 405(b). The state further argues the evidence was admissible because it supported M.J.'s credibility.

¶11 We review admission of evidence for an abuse of discretion, *State v. Winegardner*, 243 Ariz. 482, ¶ 5 (2018), but review interpretation of the rules of evidence de novo. *State v. Zaid*, 249 Ariz. 154, ¶ 5 (App. 2020). Once evidence of a person's character is determined to be admissible, "it may be proved by testimony about the person's reputation or by testimony in the form of an opinion," or "[w]hen a person's character . . . is an essential element of a charge, claim, or defense . . . the character or trait may also be proved by relevant specific instances of the person's conduct." Ariz. R. Evid. 405.

¶12 For character to be an "essential element" the evidence must prove an element "to make out a prima facie case for a claim or defense." *State v. Fish*, 222 Ariz. 109, ¶ 29 (App. 2009) (quoting *State v. Jenewicz*, 940 A.2d 269, 281 (N.J. 2008)). If the accused can successfully make the defense without offering the evidence regarding character, it cannot be regarded as "essential." *See id.* It necessarily follows that if the state can rebut the defense without offering evidence regarding character, it is nonessential.

"open[] the door" to the video evidence in the second trial, and we need not address whether he did so in the first trial.

¶13 We agree with Schmidtfranz that character was not an essential element of his third-party defense. Arizona's Rule 405(b) is identical in relevant part to the federal rule. *Compare* Ariz. R. Evid. 405(b), *with* Fed. R. Evid. 405(b). The applicability of Rule 405(b) is limited. *See Fish*, 222 Ariz. 109, ¶ 33 (holding evidence of character is not an essential element of self-defense).

¶14 The advisory committee's 1972 notes to the federal rule, also cited in *Fish*, explain the reason for limited usage of specific instances of conduct:

> Of the three methods of proving character . . . evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion.

Here, the evidence was used circumstantially to suggest that because M.J. acted appropriately with I.W. on that occasion, she could not have been culpable. The state argued in closing "[w]hen [Schmidtfranz] videotaped [I.W.] being upset and fussy on the night of November 23rd, [M.J.] is patient, putting him in his pajamas, getting him ready for bed. That's the way [M.J.] was with [I.W.]. She loved that little boy and she would never do anything to hurt him."

¶15 Additionally, it is uncontested that Schmidtfranz and M.J. were the only two adults in the house the night I.W. was rushed to the hospital. Schmidtfranz could sustain the defense of third-party culpability without offering evidence of M.J.'s character, and the state could similarly rebut that defense without evidence of M.J.'s character. Therefore, the character evidence was not essential. *See Fish*, 222 Ariz. 109, ¶ 29.

¶16 Because it was not an essential element of the defense, evidence of M.J.'s character could only come in through reputation and opinion evidence. *See id.* ¶ 33 ("an interpretation of Rule 405(b) that greatly lessens the scope of Rule 405(a) would be imprudent"). Accordingly, the

trial court erred in admitting the specific instances of conduct presented through video evidence, and we need not reach whether the probative value was outweighed by undue prejudice nor whether the evidence was admissible because it supported the credibility of the state's witness.[4] *See State v. Damper*, 223 Ariz. 572, ¶ 20 (App. 2010) (even though evidence is admissible for one reason, it may still be properly excluded for another).

Harmless Error

¶17 Having concluded the trial court erred in admitting the video evidence, we next consider whether the error was harmless. *See State v. Bible*, 175 Ariz. 549, 588 ("When an issue is raised but erroneously ruled on by the trial court, this court reviews for harmless error."). Error is harmless if "we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *Id.* The state has the burden of proving harmless error, *id.*, and it has not sustained its burden here.

¶18 The state argues that the video evidence was harmless because it was cumulative to opinion testimony offered by four witnesses, and was "rather innocuous and a very minor part of a multi-day trial." Schmidtfranz responds that it was not cumulative because it was a specific instance of conduct, different than other forms of character evidence, and was intended to evoke an emotional impact on the jury.

¶19 "The significance of evidence erroneously admitted or excluded may depend on whether it is more of the same type of evidence properly admitted in the case." *State v. Romero*, 240 Ariz. 503, ¶ 17 (App. 2016). Evidence is cumulative only where the "tainted evidence supports a fact otherwise established by existing evidence." *State v. Bass*, 198 Ariz. 571, ¶ 40 (2000). Inadmissible evidence is only "otherwise established" if we are convinced beyond a reasonable doubt that "the tainted evidence was superfluous and could not have affected the verdict." *Id.*

[4]To the extent the state is arguing this evidence supports their witness's character for truthfulness under Rule 608, Ariz. R. Evid., specific instances of conduct are only permissible on cross-examination, not on direct examination as happened here. Additionally, the state presented opinion testimony that supported the credibility of M.J. Therefore, its argument that the video is generally admissible to sustain the credibility of their witness is unavailing.

¶20 The evidence here was cumulative in the sense that the opinion testimony had the same purpose as the video evidence—to rebut Schmidtfranz's contention that M.J. was culpable—but this was not the "same type of evidence" as the properly admitted evidence in this case. *See Romero*, 240 Ariz. 503, ¶ 17; *Fish*, 222 Ariz. 109, ¶ 33 (quoting Fed. R. Evid. 405 advisory committee's notes to 1972 enactment) (A specific instance of conduct "is the most convincing[, but] [a]t the same time it possesses the greatest capacity to arouse prejudice."). On this ground, the error was not harmless.

¶21 The state also argues that the error was harmless because there was "substantial evidence of Schmidtfranz's guilt." But error is harmless only "when the evidence against a defendant is *so overwhelming* that any reasonable jury could only have reached one conclusion." *State v. Anthony*, 218 Ariz. 439, ¶ 41 (2008) (emphasis added); *see also Romero*, 240 Ariz. 503, ¶ 13 ("the state's burden is greater [in harmless error than Rule 20, Ariz. R. Crim. P., motion]: it must show overwhelming evidence"). At oral argument, the state conceded that this is "not an overwhelming evidence case" and we agree.

¶22 Here, there were disputes over what happened the night I.W. was rushed to the hospital and who inflicted the injuries on I.W. While the evidence was nevertheless sufficient to support a finding of guilt, our inquiry is "not whether the jury was justified in its verdict or even whether we would reach the same result," *Anthony*, 218 Ariz. 439, ¶ 41, but whether the state demonstrates the verdict was "surely unattributable" to the inadmissible evidence. *Id.* ¶ 39 (quoting *Bible*, 175 Ariz. at 588).

¶23 M.J.'s interviews with police were inconsistent and changed after she had learned there were suspicions of abuse. In her first interview with police, she did not mention hearing any noise when Schmidtfranz was in the room with I.W., but later told police she heard a "thump." M.J. also told police that during the 9-1-1 call she did not want Schmidtfranz to leave and did not know why he left, but later admitted that during the 9-1-1 call she had asked Schmidtfranz to get rid of marijuana that was in the house because she was afraid of losing her job.

¶24 M.J.'s daughter, K.J., testified that, while she had never seen M.J. physically abuse I.W., M.J. occasionally hit her as a form of punishment starting when K.J. was in the fourth grade. Additionally, employees of I.W.'s daycare testified that they had concerns about M.J.'s responsiveness to a past illness and injury of I.W.

¶25 Although not dispositive, we further observe that Schmidtfranz's first trial ended in a hung jury. *See Romero,* 240 Ariz. 503, ¶ 13 ("We are skeptical the prior jury would have been unable to reach a verdict if the evidence was indeed as 'overwhelming' as the state maintains."). We cannot say beyond a reasonable doubt that the video evidence did not "affect[] the verdict" here and therefore the admission was not harmless. *See Bass*, 198 Ariz. 571, ¶ 40.

¶26 Having found the error was not harmless and granting a new trial, we need not reach the other issues Schmidtfranz raises. *See State v. May*, 210 Ariz. 452, ¶ 1 (App. 2005). But in an effort to provide guidance to the trial court and parties, we address Schmidtfranz's Rule 404(b), Ariz. R. Evid., and double jeopardy arguments since they are likely to recur on remand. *See id*.

Rule 404(b) Evidence

¶27 Before the second trial, Schmidtfranz filed a motion in limine to preclude testimony regarding his involvement in I.W. sustaining a split lip and testimony that he was locked in the bathroom with I.W., that I.W. was crying, and that Schmidtfranz said to I.W. "this is why your dad doesn't come around" as improper Rule 404(b) evidence.

¶28 The state argued that, because it was not alleging the prior incidents were incidents of abuse, they were not other acts under Rule 404(b). The court agreed with the state that the evidence did not fall under Rule 404(b), and reasoned it was proper because it rebutted Schmidtfranz's theory that M.J. was responsible for I.W.'s injuries. The court also found that Schmidtfranz's statement was admissible because it was not hearsay,[5] used as "direct evidence to show [Schmidtfranz's] relationship with the child," and that the "state [was] going to present it in the proper context."

¶29 "[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Ariz. R. Evid. 404(b). Put differently, evidence cannot be

[5]While we agree with the court that Schmidtfranz's statement was not hearsay, *see* Ariz. R. Evid. 801(d)(2)(a), that does not exempt it from Rule 404(b). *See State v. Ferrero*, 229 Ariz. 239, ¶ 25 (2012) (defendant's statement to the victim to "pull down the victim's pants and underwear and expose himself" was other-act evidence).

admitted to show that "because a defendant did one bad act, he likely engaged in other bad acts." *State v. Payne*, 233 Ariz. 484, ¶ 58 (2013).

¶30 Because of the "high probability of prejudice," in a criminal case, prior acts are inadmissible unless the offeror "prove[s] by clear and convincing evidence that the prior bad acts were committed and that the defendant committed the acts." *State v. Terrazas*, 189 Ariz. 580, 582, 584 (1997) (emphasis omitted). Specifically, the court must ensure the evidence establishes that the defendant took part in the act, to protect the defendant from "highly circumstantial inferences." *Id.* at 584 (quoting Vivian M. Rodriguez, *The Admissibility of Other Crimes, Wrongs or Acts Under the Intent Provision of Federal Rule of Evidence 404(b): The Weighing of Incremental Probity and Unfair Prejudice*, 48 U. Miami L. Rev. 451, 457 (1993)). Evidence is clear and convincing if it makes the thing to be proved "highly probable." *State v. King*, 158 Ariz. 419, 424 (1988) (quoting *In re Neville*, 147 Ariz. 106, 111 (1985)).

¶31 Once a trial court determines the other act was proven by clear and convincing evidence, before ruling the other act admissible, it must also: "(1) find that the act is offered for a proper purpose under Rule 404(b); (2) find that the prior act is relevant to prove that purpose; (3) find that any probative value is not substantially outweighed by unfair prejudice; and (4) give upon request an appropriate limiting instruction." *Anthony*, 218 Ariz. 439, ¶ 33. Proper purposes for admitting other acts include, but are not limited to, "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b); *see also State v. Scott*, 243 Ariz. 183, ¶ 15 (App. 2017) (list of proper purposes in Rule 404(b) is not exclusive).

¶32 At oral argument, the state conceded these incidents were other acts and should have been analyzed under Rule 404(b). Because we reverse on other grounds, we do not pass judgment on the merits of the other-acts evidence, but do observe that the trial court erred in failing to view this evidence in light of Rule 404(b). Because of the "high probability of prejudice," our supreme court requires clear and convincing evidence and the "safety precautions" of a "protective" Rule 404(b) analysis. *Terrazas*, 189 Ariz. at 583-84. Moreover, the other acts were not used as "a passing reference, but rather a repeated theme of the [s]tate's closing argument." *Anthony*, 218 Ariz. 439, ¶ 40.

¶33 We further note that at oral argument, the state conceded that the relevance of this evidence "is very marginal." Should the state seek to admit this evidence again on remand, the court must conduct the proper

Rule 404(b) analysis to determine admissibility. *Id.* ¶ 33. Should the court determine the evidence is admissible, upon request, it should also provide an appropriate limiting instruction. *Id.*

Double Jeopardy

¶34 At the close of the state's case in his first trial, Schmidtfranz moved for a judgment of acquittal arguing there was insufficient evidence that he hurt I.W., and, alternatively, insufficient evidence to prove the state's theories of "care and control" under A.R.S. § 13-3623(A). The trial court denied the motion and the subsequent renewal of that motion.

¶35 On appeal, Schmidtfranz again argues the state presented insufficient evidence in his first trial that he had "care or custody" of I.W., but for the first time contends that retrial on those theories of abuse under § 13-3623(A) violated his constitutional right to be free from double jeopardy. *See* Ariz. Const. art. II, § 10. He argues that the Arizona Constitution's Double Jeopardy Clause grants broader protection than that of the United States Constitution on a claim of insufficient evidence.[6] Because it was not objected to below, we review this claim solely for fundamental error. *See State v. Jurden*, 239 Ariz. 526, ¶ 7 (2016) (double jeopardy violations are fundamental error). However, we need not reach the issue as to whether the Arizona Constitution precludes retrial after a jury has deadlocked where the evidence presented at trial was legally insufficient to establish guilt because the evidence in Schmidtfranz's first trial was sufficient to establish that he had "care" of I.W. within the meaning of § 13-3623(A).

¶36 We review sufficiency of the evidence, as well as questions of statutory interpretation, de novo. *State v. West*, 226 Ariz. 559, ¶ 15 (2011) (sufficiency of evidence); *State v. Bon*, 236 Ariz. 249, ¶ 5 (App. 2014) (statutory interpretation). Whether a defendant has "care" of a child is a question for the jury, *State v. Jones*, 188 Ariz. 388, 393-94 (1997), and to set aside a jury verdict for insufficient evidence, there must be a "complete absence of probative facts to support the conviction," *State v. Soto-Fong*, 187 Ariz. 186, 200 (1996).

[6]Under federal caselaw, where the first trial results in mistrial due to a hung jury, there is no basis to challenge a retrial on double jeopardy grounds on a claim of insufficient evidence. *Richardson v. United States*, 468 U.S. 317, 318 (1984).

¶37 To evaluate the sufficiency of the evidence, we must determine whether there was substantial proof such that any reasonable juror could find I.W. in Schmidtfranz's "care" beyond a reasonable doubt within the meaning of § 13-3623(A) during the first trial. *See West,* 226 Ariz. 559, ¶ 16. In interpreting a statute, we aim to give effect to the legislature's intent. *Bon*, 236 Ariz. 249, ¶ 6. In relevant part, Arizona's child abuse statute states:

> Under circumstances likely to produce death or serious physical injury, any person who causes a child . . . to suffer physical injury or, having the care or custody of a child . . . who causes or permits the person or health of the child . . . to be injured or who causes or permits a child . . . to be placed in a situation where the person or health of the child . . . is endangered is guilty of [child abuse].

§ 13-3623(A). This offense can be committed in three ways and the same evidence can be used to prove any of the three theories. *State v. West*, 238 Ariz. 482, ¶¶ 23-24, 28 (App. 2015).

¶38 "[C]are or custody" is not defined for the purposes of § 13-3623, *see* § 13-3623(F), so the terms are construed according to their "commonly accepted meanings." *Bon*, 236 Ariz. 249, ¶ 6 (quoting *State v. Petrak*, 198 Ariz. 260, ¶ 10 (App. 2000)). "Care" is defined as "charge, supervision, management: responsibility for or attention to safety and well-being." *Jones,* 188 Ariz. at 392 (quoting Webster's Third New Int'l Dictionary). And while it "implies more than the general duty of care owed to anyone who may be injured by one's negligence," it does not require legally established authority. *Id.* at 393-94. In the context of § 13-3623(A) both care and custody "require that the defendant accept responsibility for the child *in some manner*." *Id*. at 394 (emphasis added).

¶39 Evidence of care and custody may include living with the child, providing food for the child, and insisting on caring for the child—such as demanding to bathe and feed, or exercising supervision over the child. *See id.* (sufficient evidence where defendant lived with child, provided food, and took her out alone multiple times); *State v. Smith*, 188 Ariz. 263, 263-65 (App. 1996) (sufficient evidence where defendant insisted on doing everything related to parenting); *State v. Swanson*, 184 Ariz. 194, 196 (App. 1995) (insufficient evidence when defendant only transported children in his car but did not otherwise take responsibility for

them). Even when a parent is present, a non-parent can share responsibility for a child. *Smith*, 188 Ariz. at 265.

¶40 We do not reweigh the evidence, and we view it in the light most favorable to sustaining the verdict. *State v. Guerra*, 161 Ariz. 289, 293 (1989). "If reasonable [persons] may fairly differ as to whether certain evidence establishes a fact in issue, then such evidence must be considered as substantial." *Jones,* 188 Ariz. at 394 (quoting *State v. Tison*, 129 Ariz. 546, 553 (1981)); *see also State v. Mathers*, 165 Ariz. 64, 67 (1990).

¶41 Here, there was substantial evidence for a reasonable juror to conclude beyond a reasonable doubt that I.W. was in Schmidtfranz's care. Schmidtfranz admitted to living with M.J. and I.W. and he wanted to be a father figure to I.W., telling M.J. that he was "trying so hard to make a family with [them]" and that I.W. needed to learn to trust him. On at least one occasion, Schmidtfranz watched I.W. on his own at the house and cleaned I.W.'s congested nose by himself in the bathroom. Schmidtfranz would occasionally buy groceries and help cook.

¶42 On the night of I.W.'s injury, Schmidtfranz carried I.W. in the house and insisted on getting I.W. ready for bed. This included changing his diaper, putting on pajamas, and placing him in the crib. He additionally made I.W.'s bottle and tried to take it to him.

¶43 Schmidtfranz contends these instances were merely to help M.J. out, and to "move things along so that he and [M.J.] could spend some time together alone," but there was substantial proof for a reasonable juror to conclude beyond a reasonable doubt that I.W. was in Schmidtfranz's care—he had admitted to living with I.W., he had insisted on caring for I.W., and he had exercised supervisory control over I.W. on more than one occasion.

¶44 Schmidtfranz accepted responsibility for I.W. in some manner, *see Jones*, 188 Ariz. at 392, therefore there was sufficient evidence of "care"[7] under § 13-3623(A). Because Schmidtfranz was not entitled to an

[7]Because the statute is in the disjunctive—"care *or* custody," § 13-3623(A) (emphasis added), we need not address Schmidtfranz's claim that "custody" refers to legally established authority, while "care" is voluntarily assumed. If there is sufficient evidence of "care," as there is here, Schmidtfranz need not also have "custody" to sustain a guilty verdict. *See Jones*, 188 Ariz. at 394 ("Only when no substantial evidence exists to find

acquittal under those theories we find no reason to depart from the general rule that "double jeopardy protections do not prohibit a subsequent prosecution after a mistrial due to a hung jury." *State v. Huffman*, 222 Ariz. 416, ¶ 6 (App. 2009). Therefore, the state can present evidence related to these theories on remand.

Disposition

¶45 We reverse Schmidtfranz's conviction and sentence, and remand for a new trial.

B R E A R C L I F F E, Judge, specially concurring:

¶46 I concur fully in this decision. But, because it is not self-evident, I write separately to explain why the evidence of Schmidtfranz's involvement in I.W. sustaining a split lip and testimony that Schmidtfranz said to I.W. "this is why your dad doesn't come around" is Rule 404(b) evidence. At least in the opinion of this writer, the evidence demonstrates Schmidtfranz's character or character trait as an abuser (both physical and emotional) of small children with ill-will toward I.W. for the purpose of showing that Schmidtfranz committed the act of child abuse for which he was charged. So, as we conclude here, although relevance other than for this purpose may be shown on retrial to allow use of one or both of these pieces of evidence, the state must make the required showings and the trial court must give this evidence the proper scrutiny under Rule 404(b).

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that the defendant had 'care' or 'custody' of the child will a . . . reversal of a conviction be appropriate.").