IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

NATHAN LARRY JOSEPH LOEBE,
Appellant.

No. 2 CA-CR 2019-0137
Filed May 28, 2021

Appeal from the Superior Court in Pima County
No. CR20174678001
The Honorable Deborah Bernini, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

James Fullin, Pima County Legal Defender
By Jeffrey Kautenburger, Assistant Legal Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

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

¶1 Nathan Loebe appeals from his conviction after a jury trial for twelve counts of sexual assault, one count of attempted sexual assault, five counts of kidnapping, and three counts of stalking. The trial court sentenced him to combined concurrent and consecutive terms of imprisonment totaling 260 years. On appeal, Loebe contends that the court erred by refusing to sever the charges for trial. We affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to upholding the jury's verdicts." *State v. Tucker*, 231 Ariz. 125, ¶ 2 (App. 2012). Following his successful, unopposed motion to remand to the grand jury for a redetermination of probable cause, Loebe was indicted on one count each of attempted sexual assault and sexual abuse, and multiple counts of sexual assault, kidnapping, and stalking, with the alleged crimes occurring between May 2003 and May 2015, against multiple victims. Following pretrial motions, two counts—one kidnapping and one stalking—were dismissed.

¶3 Loebe filed a pretrial motion seeking disclosure of the state's Rule 404(c), Ariz. R. Evid., other-act evidence, which the trial court granted. In response, the state disclosed that the other-act evidence it intended to introduce included two uncharged sexual assaults, one in Tucson in 2013, and another in Kentucky in 2017. Following that disclosure, Loebe moved to sever the charges for trial. The court granted severance of count three, which was the one charge for sexual abuse, but denied severance of all other counts, stating "that evidence of each alleged sexual assault and kidnapping count would be cross-admissible as to the other alleged sexual offenses under Rule 404(c)." The court further reasoned that the evidence was also admissible under Rule 404(b), Ariz. R. Evid., "to prove both intent, propensity and absence of consent and further to show motive,

opportunity, plan, knowledge and/or absence of mistake on behalf of [Loebe]."

¶4 During trial, Loebe sought to dismiss (renumbered) counts three, nine, fourteen, sixteen, and seventeen in a motion made pursuant to Rule 20, Ariz. R. Crim. P. The trial court granted the motion as to counts sixteen and seventeen (sexual assault and kidnapping), but denied the motion as to the remaining counts. Following a fifteen-day jury trial, Loebe was found guilty on the remaining twenty-one counts. The court sentenced Loebe as described above, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Analysis

¶5 Loebe argues that the trial court abused its discretion by denying severance of the charges against him based on its conclusion that, if severed, both the charged and uncharged acts would nonetheless be cross-admissible under Rules 404(b) and 404(c), Ariz. R. Evid. "We review a trial court's decisions on joinder and severance for an abuse of discretion." *State v. LeBrun*, 222 Ariz. 183, ¶ 5 (App. 2009). We also review decisions on the admissibility of evidence for an abuse of discretion. *Id.* To the extent the court's ruling involved an interpretation of a rule or statute, we review such determinations *de novo*. *State v. Jones*, 246 Ariz. 452, ¶ 5 (2019). Rule 13.3(a)(1), Ariz. R. Crim. P., permits the joinder of two or more offenses if they "are of the same or similar character." If charges are joined solely under Rule 13.3(a)(1), "[a] defendant is entitled to a severance . . . unless evidence of the other offense or offenses would be admissible if the offenses were tried separately." Ariz. R. Crim. P. 13.4(b).

¶6 Here, it is undisputed that the charges in question were joined under Rule 13.3(a)(1), and there is no challenge to the propriety of that joinder. Loebe claims that the trial court's denial of severance denied him "a fair trial process." We will first determine if the denial of severance was proper under Rules 13.3 and 13.4 and then, if not, whether reversal is required. *State v. Garland*, 191 Ariz. 213, ¶ 9 (App. 1998).

¶7 Loebe argues that the evidence of the other sexual assaults would not have been cross-admissible under either Rule 404(b) or Rule 404(c). However, Loebe failed to adequately support his argument as to Rule 404(b), and thus we find he has abandoned and waived that claim. *See* Ariz. R. Crim. P. 31.10(a)(7)(A); *see also State v. Carver*, 160 Ariz. 167, 175

(1989).[1] As to his remaining argument, Loebe asserts that the "court's analysis for cross-admissibility under Rule 404(c) of the individual charges was prejudicially flawed at each step." Therefore, we will address each factor of the court's analysis in turn.

¶8 Rule 404(c), Ariz. R. Evid., applies when the defendant is charged with a sexual offense and permits evidence of the defendant's other crimes, wrongs, or acts to be admitted "if relevant to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged." Before evidence is admitted under Rule 404(c), the trial court must make three findings. First, there must be clear and convincing evidence that the defendant committed the other act. *See* Ariz. R. Evid. 404(c)(1)(A); *see also State v. Aguilar*, 209 Ariz. 40, ¶ 30 (2004) (trial court must determine clear and convincing evidence shows defendant committed other act). Second, the commission of the other act must provide "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." *Aguilar*, 209 Ariz. 40, ¶ 30; Ariz. R. Evid. 404(c)(1)(B). And third, the evidentiary value of the other-act evidence must not be substantially outweighed by the danger of unfair prejudice, or any other factors listed in Rule 403, Ariz. R. Evid. *Aguilar*, 209 Ariz. 40, ¶ 30; Ariz. R. Evid. 404(c)(1)(C). For each of the three elements, the trial court must make specific findings, providing "some specific indication of why [it] found those elements satisfied." *Aguilar*, 209 Ariz. 40, ¶ 36; Ariz. R. Evid. 404(c)(1)(D). The court made those findings in this case.

¶9 Loebe first contends that "there was not clear and convincing evidence that [he had] committed sexual assault in each of the individual victim cases." To support this claim, Loebe only specifically discusses the

[1]While he cites to appropriate legal authority to support his Rule 404(b) argument, he provides no substantial factual support for this contention. He merely states that identity was "largely not at issue," but does not address any of the other permissible purposes to admit other-act evidence under Rule 404(b). He then states that "[t]o the extent that details of the other acts—harassing texts and phone calls and fake or partial names—had some relevance to a permissible purpose, they were too generic and/or attenuated when weighed against the prejudicial effect for bad character propensity." We find this to be insufficient support for his argument and therefore do not address it.

evidence relative to two victims, Mary[2] and Linda.[3] He argues that, in Mary's case, "[t]here was not clear and convincing evidence that she had communicated to him that she did not want to engage in sex or that Loebe had knowledge that the sexual contact was without her consent." Regarding Linda's case, Loebe argues there was "no clear and convincing evidence that [he] had knowledge that any attempted sexual contact was without her consent." Loebe asserts that, because Linda "started kissing him, making out with him and gave him indication that she wanted to engage in sexual activity by telling him about her preferred position because [of] an injury," he perceived her consent and therefore the finding that he attempted sexual assault was not supported.[4]

¶10 Our supreme court has stated that when the other act sought to be admitted under Rule 404(c) is sexual assault, "[t]he resolution of th[at] issue—whether the victims consented to the sexual contact—turns largely on the credibility of the witnesses." *Aguilar*, 209 Ariz. 40, ¶ 35. And a trial court cannot determine that clear and convincing evidence shows a defendant committed other sexual assaults without first hearing from the victim, or at least reviewing the victim's prior testimony. *Id.* ¶¶ 33-35. The trial court in *Aguilar* only considered the transcript of the grand jury proceedings, the pleadings, and the arguments presented at oral argument. *Id*. ¶ 33. Because it had not considered any testimony from the victims, our supreme court held the trial court could not have made the necessary determination that the victims were more credible than the defendant and,

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[2]The victims are identified throughout the decision by pseudonyms.

[3]Loebe does not specifically discuss any other victims and only states that, "each case involved close, nuanced questions about 'without consent.'" Because Loebe failed to develop arguments as to why there was not clear and convincing evidence that he had committed the acts against the other six victims, or the two uncharged victims, we find those arguments waived and only address this argument as to Mary and Linda. *See State v. Carver*, 160 Ariz. 167, 175 (1989); *see also* Ariz. R. Crim. P. 31.10(a)(7)(A).

[4]Loebe also claims that, under this same reasoning, the trial court should have granted his Rule 20 motion on Count 14—attempted sexual assault of Linda. However, because Loebe did not develop this claim further, we do not consider it. *See Carver*, 160 Ariz. at 175 ("Failure to argue a claim usually constitutes abandonment and waiver of that claim.").

therefore, could not have made a sufficient finding as to Rule 404(c)(1)(A). *Id.* ¶¶ 33, 35.

¶11 As to victims Mary and Linda, Loebe admitted having had sexual relations with them—albeit consensually. Unlike in *Aguilar*, the trial court here considered more than grand jury transcripts and pleadings in making its determination for Rule 404(c)(1)(A); the court considered audio tapes and transcripts of the victims' interviews with detectives, in addition to other exhibits and police reports. Consequently, it had a basis to evaluate the relative credibility of the victims' and Loebe's accounts. Following its review, the court outlined specific findings to support its conclusion that there was clear and convincing evidence that Loebe had committed the sexual assaults.

¶12 In Mary's case, the trial court found the most salient facts, among others, to be that Loebe and Mary had met at a bar, that she could not remember what had happened when they went to her house, and that the next day Loebe had texted Mary a picture of her naked and sleeping from the night before. In Linda's case, the court found it important that Loebe had taken her phone and car keys, had said he would only return the items if she came inside the house, and had told Linda "they were going to have sex whether she liked it or not," and "forcefully push[ed] her onto his bed." Because the court considered the victims' statements and made specific findings to support its determination, the court did not abuse its discretion in finding that there was clear and convincing evidence that Loebe had committed the sexual assaults against Mary and Linda.

¶13 Loebe also argues, as to the second prong, that the other acts do not provide a reasonable basis to determine that he had an aberrant sexual propensity to commit sexual assault. He asserts that, "[w]hile other acts of drug-facilitated sexual assault might provide a reasonable basis to infer an aberrant sexual propensity, there was simply insufficient evidence of drugging" because "there was no forensic evidence, no positive test result, and . . . only speculative experiential claims from victims who had voluntarily consumed significant amounts of alcohol." Specifically, Loebe supports his argument with the facts that the drug tests done on both victims Meredith and Barbara returned negative results, and Meredith, Barbara, and another victim, Jean, described drinking multiple alcoholic drinks.[5]

[5]Because Loebe does not develop this argument as to the remaining six victims or the other uncharged victim, we find any claim with regards to those cases waived and will only address the argument as it pertains to

¶14 Loebe appears to argue that there had to be evidence of drugging, not only of sexual assault, for there to be a reasonable basis to find that he had an aberrant sexual propensity. Loebe cites to *Aguilar*, again, claiming the trial court in that case "did not say that commission of sex[ual] assault . . . necessarily gives rise to an aberrant sexual propensity." Even though *Aguilar* does not say sexual assault necessarily shows aberrant sexual propensity, it does state that the admissibility of evidence of other acts of sexual misconduct is not limited to acts traditionally considered to be abnormal or aberrant. *Aguilar*, 209 Ariz. 40, ¶ 27. Furthermore, *Aguilar* held that "the sexual propensity exception of Rule 404(c)" "applies to the sexual offenses listed in A.R.S. § 13-1420(C), which includes charges involving nonconsensual heterosexual contact between adults." *Id.* ¶ 28. Therefore, regardless of the quantum of evidence that Loebe drugged these victims, clear and convincing evidence of nonconsensual sexual contact between the victims and Loebe provides a reasonable basis to infer Loebe had an aberrant sexual propensity to commit the other charged acts.

¶15 The trial court here sufficiently detailed the facts it found particularly relevant in each victim's case, as required by Rule 404(c)(1)(D). *See Aguilar*, 209 Ariz. 40, ¶ 36 (Rule 404(c)(1)(D) "mandates some specific indication of why the trial court found those elements satisfied."). In Meredith's case, the court cited to her statement that she had "left her drink unattended after which she felt 'like a lightweight' and knew she shouldn't be feeling that way, that something wasn't right." Meredith also stated that Loebe had "sexually assaulted her, penetrating her vaginally, anally and orally." The court then noted Barbara's report that, after drinking with Loebe at his house, she had felt "'things spinning,' different than just being drunk, and that she was scared at having lost control." The court also considered Barbara's statement that Loebe had "got[ten] on top of her and sexually assaulted her vaginally, then washed her in the shower and started having anal sex with her." Furthermore, the court considered Jean's description of one of the uncharged acts, in which she stated that Loebe had "poured her a glass of wine," and, after she drank it, "she remembered feeling a blur," and that Loebe had given her "'eye drops' that left her with a 'fuzzy' memory." The court found this to be clear and convincing evidence to support a finding that Loebe had sexually assaulted Meredith, Barbara, and Jean—findings which are not argued on appeal, and, in accord

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Meredith, Barbara, and Jean. *See Carver*, 160 Ariz. at 175; *see also* Ariz. R. Crim. P. 31.10(a)(7)(A). Furthermore, to the extent Loebe is asserting a constitutional argument here, we also find that claim waived on appeal for the same reasons.

with *Aguilar*, the court did not abuse its discretion in finding the acts demonstrated an aberrant sexual propensity.

¶16 Finally, as to the third prong of Rule 404(c), Loebe argues that the trial court "erred in considering the danger of unfair prejudice." In applying the traditional factors under Rule 403, Ariz. R. Evid.—"unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence"—Rule 404(c), requires the court to also consider the factors listed in Rule 404(c)(1)(C)(i)-(viii). Those are the "remoteness of the other act," the similarities and differences between the other and charged act, "the strength of the evidence that defendant committed the other act," the "frequency of the other acts," the "surrounding circumstances," "relevant intervening events," other similarities or differences between the acts, and any "other relevant factors." Ariz. R. Evid. 404(c)(1)(C)(i)-(viii). We will not disturb a trial court's Rule 403 determination unless there is an abuse of discretion. *See State v. Gomez*, 250 Ariz. 518, ¶¶ 13-15 (2021).

¶17 Loebe claims that, because there was not clear and convincing evidence that he had committed the sexual assaults and there was not a reasonable basis to infer he had an aberrant sexual propensity, non-severance was prejudicial. Because we have already found the trial court did not err in finding the first two requirements of Rule 404(c) satisfied, this reasoning fails to support his argument. *State v. Wood*, 180 Ariz. 53, 72 (1994) ("Our disposition of the other issues on appeal, however, makes it unnecessary to reach this issue."). Loebe further reasons that "the state's drugging theory became a flawed heuristic for Loebe's purported knowledge of lack of consent and generally bad character," and that, "because there were victim cases that involved no drinking—the vehicle for alleged drugging—the prejudicial effect of non-severance was further amplified."[6] He also asserts the fact that the "discre[te], separate incidents" span over twelve years, to support his claim that it was prejudicial for the charges to remain joined.

[6]In his opening brief, Loebe also claims that "the trial court erred in failing to grant a Rule 20 motion on Count 9 ([Meredith] Stalking)." In a footnote, he further asserts that the court "also erred in denying Loebe's request for instructions that included 'acquiescence' in relation to 'non-consent.'" Because he does not develop these claims further, we do not consider them. *See Carver*, 160 Ariz. at 175 ("Failure to argue a claim usually constitutes abandonment and waiver of that claim.").

¶18 The trial court did not abuse its discretion. Our court has previously concluded that the probative value of a defendant's prior sexual assault is not substantially outweighed by unfair prejudice when the nature of the victims' individual relationships with the defendant, and the nature of the acts, were similar. *State v. Scott*, 243 Ariz. 183, ¶ 17 (App. 2017). Like in *Scott*, there are several similarities between the nature of Loebe's relationships with the victims, and the nature of the sexual assaults themselves. Here, the court found that: eight of the victims reported that Loebe had "used a false name or persona when introducing himself," all the victims reported Loebe had sexually assaulted them the first time they met him in person, six victims reported feeling "drugged or inexplicably unable to defend themselves against [Loebe's] assaults," and seven victims reported harassing phone calls or texts after the sexual assault occurred. While there were some differences between the other acts—such as whether alcohol was involved or the victim reported feeling drugged—it was not an abuse of discretion for the court to find those features insufficiently substantial. For evidence to be cross-admissible under Rule 404(c), the other act and the charged act need not be identical. *See State v. Benson*, 232 Ariz. 452, ¶ 14 (2013). There merely need be sufficient similarities between the acts to "provide[] a reasonable basis for the court to infer that . . . [Loebe's] aberrant sexual propensities in each attack were probative on the charges involving all victims." *Id.* ¶ 14. Here, the court found "[t]he similarities outnumber[ed] the differences between the events." We conclude that it was not unreasonable for the court to have found the similarities outweighed the differences, and the relevance of the other acts were not substantially outweighed by the risk of prejudice.

¶19 As to Loebe's assertion that the twelve-year span over which the assaults occurred made the crimes too remote from each other, the trial court did not err in finding that the numerous similarities between the assaults also outweighed the possible remoteness concern. In *Benson*, the defendant argued that evidence of a prior sexual assault was not admissible under Rule 404(c) because it had occurred two years and nine months before the other assaults and therefore was too remote. *Id.* ¶¶ 13, 15. Our supreme court affirmed the admission of the sexual assault because the time interval between the assaults "did not require the trial court to find that the probative value of the evidence of each attack was substantially outweighed by the danger of unfair prejudice." *Id.* ¶ 15.

¶20 While we recognize that the two years and nine months between the assaults in *Benson* is significantly less than the twelve-year period here, remoteness is "solely [a] factor[] to be considered under subsection (1)(c) of Rule 404(c)." Rule 404(c) cmt. to 1997 amend. Rule

404(c) "does not contemplate any bright line test of remoteness," and it is to be considered by the trial court along with the other factors listed in Rule 404(c)(1)(C). *Id.* After the 2007 incident was severed from the other charges, there was about eight years between the first incident in 2003 and the third incident in 2011. However, there were significant similarities among all incidents, as discussed above, despite the time between incidents. And, as the court noted, beginning in 2011, the charged acts "occurred on an almost yearly basis." Therefore, because the court made specific findings regarding the factors it was required to consider under Rule 404(c)(1)(C), and it was not an abuse of discretion to find any remoteness was not unfairly prejudicial, we affirm the court's finding as to the third prong of the Rule 404(c) analysis.

Disposition

¶21 For the foregoing reasons, we affirm the trial court's denial of the motion to sever.