IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

GILBERTO CASADO,
Appellant.

No. 2 CA-CR 2020-0009
Filed March 4, 2021

Appeal from the Superior Court in Pima County
No. CR20185310001
The Honorable Howard Fell, Judge Pro Tempore

AFFIRMED

COUNSEL

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Counsel for Appellee

Joel Feinman, Pima County Public Defender
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MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 After a jury trial, Gilberto Casado was convicted of aggravated assault with a deadly weapon or dangerous instrument, and the trial court sentenced him to a prison term of six years. On appeal, Casado argues the trial court erred by admitting evidence of his intoxication. He also contends the court erred by not *sua sponte* taking remedial measures to ensure that the jury's verdict was unanimous when it allowed the state to present evidence that made the charge duplicitous. And lastly, Casado argues that he was convicted of a crime for which he was not indicted. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the jury's verdict. *See State v. Lewis*, 236 Ariz. 336, ¶ 2 (App. 2014). In 2018, Casado and E.G. lived next door to each other at an apartment complex but rarely interacted. On November 18, E.G. was heading to his second-floor apartment when he encountered Casado on the stairwell. As they approached each other, Casado showed that he had a knife in his hand and threatened to kill E.G. This frightened E.G. "a little bit" and he started to back away from Casado. Casado continued to advance toward E.G. holding the knife, and E.G. eventually fell backwards over an electrical box. As E.G. fell, Casado lunged at him with the knife and cut E.G.'s chin.

¶3 E.G. pushed Casado away and called the police on his cell phone while Casado went back to his apartment. Once in his apartment, Casado "had a little bit of alcohol" and went to bed. Shortly thereafter, law enforcement arrived and ordered Casado to come out of his apartment.

¶4 After a few minutes, Casado came out of his apartment and was taken into custody. Casado admitted he had a knife in his apartment. After obtaining a warrant, officers searched the apartment and found a knife under Casado's mattress that matched the description E.G. had

provided. Casado claimed that he put it there "[e]very time [he] returned from walking the dog in the evening."

¶5 While in the back of Officer Keeme-Sayre's patrol car, Casado alternated between "yelling and . . . making [derogatory] statements" about E.G. and "being calm." A grand jury indicted Casado for aggravated assault with a deadly weapon or dangerous instrument. He was convicted and sentenced as outlined above. This timely appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033.

Discussion

Intoxication Evidence

¶6 Casado argues the trial court erred in admitting evidence that he had "imbibed alcohol before or after the incident because this evidence was other acts evidence that was offered for an improper purpose under Rule 404(b)[, Ariz. R. Evid.], irrelevant and not intrinsic, and unduly prejudicial to [his] constitutional right to a fair trial under Rule 403[, Ariz. R. Evid.]" Casado also maintains the evidence was inadmissible because it was not disclosed by the state before trial as required by Rule 15.1(b)(7), Ariz. R. Crim. P. The state responds that Casado's disclosure and Rule 404 arguments fail because the evidence was intrinsic to the charged assault and, accordingly, is not other-acts evidence subject to analysis under Rule 404. The state alternatively argues that even if the evidence is not intrinsic, it was admissible to "prove Casado's motive."[1] *See* Ariz. R. Evid. 404(b)(2).

¶7 Casado recognizes that because he did not object below, he has forfeited all but fundamental-error review. *See State v. Bible*, 175 Ariz. 549, 572 (1993) (holding that only claim of fundamental error may be raised for the first time on appeal). Fundamental error is "error going to the

[1]Both Casado and the state referred to the evidence as "evidence of intoxication," which appears to focus on the condition of Casado's intoxication as the other act, and not the act of drinking before and after the incident. Because the former arises from the latter, we likewise do not draw a distinction between the condition and the act of drinking. *See State v. Hulsey*, 243 Ariz. 367, ¶¶ 36-47 (2018) (although referring to other-acts evidence as "methamphetamine use," court focused, in part, on effect drug had on defendant at or near time of incident in determining admissibility under Rule 404(b); it was proper because it showed he was agitated, which explained his reaction to police presence).

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 (2005) (quoting *State v. Hunter*, 142 Ariz. 88, 90 (1984)). Casado must show error exists, that the error was fundamental, and that it caused him prejudice. *State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018).

Intrinsic Evidence

¶8 We first address the state's argument that Rule 404(b) does not apply because the evidence of Casado's drinking and intoxication was intrinsic to the underlying offense. Under Rule 404(b), "evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Intrinsic evidence, however, "is not evidence of another [act]." *State v. Butler*, 230 Ariz. 465, ¶ 29 (App. 2012). Rather, intrinsic evidence is "evidence of acts that are so interrelated with the charged act that they are part of the charged act," *State v. Ferrero*, 229 Ariz. 239, ¶ 20 (2012), and such evidence is thus admissible without regard to Rule 404(b), *State v. Herrera*, 232 Ariz. 536, ¶ 21 (App. 2013). Our supreme court has clarified that evidence is intrinsic "if it (1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act." *Ferrero*, 229 Ariz. 239, ¶ 20. However, evidence is not intrinsic if it "merely 'complete[s] the story' or . . . 'arises out of the same transaction or course of events' as the charged act." *Id.*

¶9 Evidence of Casado's alcohol consumption and intoxication was introduced several times during trial. On direct examination, the state asked E.G. whether he had spoken with Casado earlier on the day of the incident or had interactions with him in the days leading up to the assault "that would cause [Casado] to have ill feelings toward [E.G.]." When E.G. answered in the negative, the state asked him whether Casado "seemed intoxicated or not" while he was chasing E.G. with a knife. E.G. replied that although he had seen Casado drinking earlier that evening and "[h]e sounded slurred," he "couldn't tell how intoxicated he was."

¶10 During cross-examination, Casado elicited testimony from Keeme-Sayre that Casado had been cooperative with law enforcement when he was initially questioned about possessing a knife. On redirect, the state asked whether Casado was "cooperative the entire time," specifically referring to when he was in the back of the patrol car. Keeme-Sayre answered "[n]o" and that Casado "would go between being kind of calm and collect[ed] to being angry, yelling and cussing and kicking my patrol

vehicle." And in response to a juror question whether there was "any indication that [Casado] may have consumed alcohol," Keeme-Sayre stated that he "seemed to be intoxicated" because he had "slurred speech"; "blood shot watery eyes"; and, based on his training and experience, "when people drink some of the [e]ffects that we see [are] that peoples[']' moods change very quickly."

¶11 Finally, during cross-examination, Casado testified that he had been drinking before and after the incident with E.G. In response to Casado's statements on direct examination that he was "not as strong as [he] used to be" and that he "ha[s] no strength," the state questioned him on cross-examination about why a man who testified he has no strength could make "Officer Keeme-Sayre [] worried [he was] actually going to break the window in his patrol car because [he was] kicking so hard." Casado answered that he "had something to drink and [he] was drunk" and when the state asked if drinking makes him stronger he replied, "Possibly it does, yes."

¶12 The state argues that evidence of Casado's intoxication was intrinsic to the aggravated assault with a deadly weapon or dangerous instrument because it was both contemporaneous with and facilitated the commission of the charged act. Specifically, the state asserts that Casado's intoxication facilitated the commission of the charged assault because it provided an explanation to the jurors as to why Casado might have assaulted E.G. "without any apparent provocation or precipitating interaction." The state also asserts that because it was required to prove whether Casado acted intentionally, knowingly, or recklessly, the fact that he was intoxicated at the time of the charged act would help the jury understand "why he may have formulated the intent to place [E.G.] in reasonable apprehension of imminent physical injury." (Emphasis omitted.) Casado argues that the intoxication evidence was not intrinsic to the charged offense and is therefore subject to Rule 404 analysis. We agree with Casado. To the extent the state presented the evidence to show intent, as we discuss below, that is something expressly covered by Rule 404(b).

¶13 Notably, in its closing arguments, the state made no mention that the evidence of Casado's intoxication established his intent. Indeed, the intoxication evidence was mostly used to help explain Casado's mood changes and for impeachment purposes to show he was lying about his lack of strength. Likewise, this evidence did not directly prove the charged act, something the state apparently acknowledged in its closing argument when it stated that "alcohol plays no part in this case other than maybe giving you a reason why the defendant might have done this." But although

intoxication may have provided the motive for Casado's actions, it did not constitute intrinsic evidence. *See State v. Atwood*, 171 Ariz. 576, 638 (1992), *disapproved on other grounds by State v. Nordstrom*, 200 Ariz. 229 (2001) ("motive defined as an inducement, or that which leads or tempts the mind to indulge a criminal act"). As such, the intoxication evidence did no more than aid in "complet[ing] the [state's] story" of that day's events. *Ferrero*, 229 Ariz. 239, ¶ 20. Evidence of Casado's alcohol consumption and intoxication did not constitute intrinsic evidence and is thus subject to Rule 404 analysis.

Other-Acts Evidence

¶14 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 in order to show action in conformity therewith." Other-acts evidence "may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." *Id.*

¶15 Because the evidence that Casado had been drinking before and after the incident is other-acts evidence under Rule 404(b), Casado argues that reversal is required because the state failed to disclose this evidence as required by Rule 15.1(b)(7), Ariz. R. Crim. P. As we noted above, he recognizes that because he did not object below to the state's non-disclosure of other-acts evidence, we review for fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 12.

¶16 Under Rule 15.1(b)(7), the state is required to disclose "a list of the defendant's other acts the state intends to use at trial." Casado maintains the violation resulted in the jury not deciding the case on the law and facts but rather on "feelings that [Casado] is a bad person." Assuming, without deciding, that the state erred by not making the required disclosure of the intoxication evidence, the error was neither fundamental nor prejudicial. Because evidence of Casado's intoxication was not essential to the verdict given the other evidence presented at trial, Casado has not met his burden to prove the error deprived him of a fair trial. *Cf. State v. Naranjo*, 234 Ariz. 233, ¶ 64 (2014) (finding that improperly admitted other-acts evidence did not constitute fundamental, prejudicial error "[g]iven the nature and extent" of the other evidence presented).

¶17 Casado next argues that the trial court erred by admitting the improper other-acts evidence of his intoxication. *See* Ariz. R. Evid. 404(b). He maintains that the intoxication evidence risked "confusion of the

issues." In order to introduce other-acts evidence, it must be relevant under Rule 402, Ariz. R. Evid., a proper purpose must be shown under Rule 404(b)(2), the probative value of the evidence must not be substantially outweighed by its potential prejudicial effect under Rule 403, Ariz. R. Evid., and the court must give a proper limiting instruction if requested under Rule 105, Ariz. R. Evid.[2] *State v. Hulsey*, 243 Ariz. 367, ¶ 45 (2018). Again, Casado's failure to object below has limited our review to fundamental, prejudicial error. The first step in fundamental-error analysis is deciding whether error occurred. *Escalante*, 245 Ariz. 135, ¶ 21. We conclude it did not.

¶18 The intoxication evidence was relevant to complete the story and provide an explanation for the state's theory of the case. "Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Ariz. R. Evid. 401. Relevant evidence is not required to be "sufficient to support a finding of an ultimate fact; it is enough if the evidence, if admitted, would render the desired inference more probable." *State v. Togar*, 248 Ariz. 567, ¶ 13 (App. 2020) (quoting *State v. Paxson*, 203 Ariz. 38, ¶ 17 (App. 2002)). The state asserts that Casado attacked E.G. without any provocation and, absent additional context, the jury would be left to speculate why Casado acted the way he did. The state argues the intoxication evidence was relevant to show Casado's motive for his assaultive act. Proof of motive is a proper purpose for introducing other-acts evidence. Ariz. R. Evid. 404(b)(2).

¶19 And finally, we conclude that Casado has not met his burden of showing that the probative value of the intoxication evidence was substantially outweighed by unfair prejudice. During closing arguments, the state limited the scope of the intoxication evidence to its proper purpose when it stated, "[t]he alcohol plays no part in this case other than maybe giving you a reason why the defendant might have done this" and "[n]ow, the only role that alcohol does play a part in this is to give you a reason why this old, small, unassuming man might have attacked this victim with a knife." Both of the state's remarks show that it was not trying to use the intoxication evidence to unfairly prejudice the jury that "[Casado] ha[d] a bad character as a mean drunk," but rather to provide a motive for Casado's actions. Because the intoxication evidence was relevant, used for a proper

[2]Casado never requested a limiting instruction concerning the use of this other-acts evidence.

purpose, and not unfairly prejudicial, we find no error occurred, fundamental or otherwise.

Unanimous Verdict

¶20 Casado argues that at trial, the jury "was presented with evidence separately supporting three different types of assault."[3] He contends that reversal is therefore required because the trial court did not *sua sponte* take remedial measures to ensure a unanimous verdict when the state presented evidence that made the aggravated assault charge duplicitous. Because Casado failed to object below, we again review solely for fundamental, prejudicial error. *See Escalante*, 245 Ariz. 135, ¶ 12.

¶21 The three types of assault codified in A.R.S. § 13-1203(A) are distinct and separate crimes. *See State v. Freeney*, 223 Ariz. 110, ¶ 16 (2009). A duplicitous charge exists "[w]hen the text of an indictment refers only to one criminal act, but multiple alleged criminal acts are introduced to prove the charge." *State v. Klokic*, 219 Ariz. 241, ¶ 12 (2008). A duplicitous charge does not need to be cured before trial and can be remedied by "requir[ing] 'the state to elect the act which it alleges constitutes the crime, or instruct[ing] the jury that they must agree unanimously on a specific act that constitutes the crime before the defendant can be found guilty.'" *Id.* ¶ 14 (quoting *State v. Schroeder*, 167 Ariz. 47, 54 (App. 1990) (Kleinschmidt, J., concurring)). Because defendants in a criminal case have the constitutional right to a unanimous verdict, *see* Ariz. Const. art. II, § 23, the court's failure to remediate a duplicitous charge to ensure a unanimous verdict constitutes fundamental error. *State v. Davis*, 206 Ariz. 377, ¶¶ 63-64 (2003). But fundamental error only requires reversal if the defendant can establish prejudice. *See State v. Waller*, 235 Ariz. 479, ¶ 34 (App. 2014) ("If the defendant suffers no prejudice from the duplicitous charging, his conviction need not be reversed.").

¶22 In this case, during closing arguments, the state argued that the jury did not have to agree on the type of assault. Additionally, the jury verdict forms only required the jury to pick one of the types of assault under A.R.S. § 13-1203(A) *if* they found Casado not guilty of aggravated assault with a deadly weapon or dangerous instrument or, "if after careful

[3]Casado asserts that based on the evidence the jury reasonably could have believed any of the following scenarios: that Casado had cut E.G. with the knife; that Casado "brandished the knife threateningly," but never touched E.G.; or that Casado touched E.G. with the knife without causing any injury, only intending to scare him.

deliberation, [could not] agree upon a verdict." The jury found Casado guilty of aggravated assault with a deadly weapon or dangerous instrument, and consequently did not select one of the three types of assault. The state's argument and the verdict form were incorrect and, thus, constituted error. *See Waller*, 235 Ariz. 479, ¶ 34 (finding that "the trial court erred . . . by not requiring a unanimous verdict on the underlying assault"); *see also Davis*, 206 Ariz. 377, ¶ 61 ("[T]he resulting risk that the jury returned a non-unanimous verdict constituted error."). The question nevertheless remains whether the court's failure to provide the remedial measure of providing an instruction to ensure the jury's verdict was unanimous requires reversal in this case.

¶23 Casado argues that "where a defendant is able to demonstrate that a jury may have reached a non-unanimous verdict, prejudice is established." But this court has determined that "if the defendant suffers no prejudice from the duplicitous charging, his conviction need not be reversed." *Waller*, 235 Ariz. 479, ¶ 34.

¶24 Casado acknowledges that the curative measures mentioned above are not required "where all of the separate acts introduced into evidence are part of a single criminal transaction." But relying on *Klokic*, 219 Ariz. 241, ¶ 28, he argues the single transaction exception does not apply when the acts give rise to separate defenses. And he asserts that in this case, he "offered different explanations" for his conduct.

¶25 In *Klokic*, we explained that "multiple acts may be considered part of the same criminal transaction 'when the defendant offers essentially the same defense to each of the acts and there is no reasonable basis for the jury to distinguish between them.'" 219 Ariz. 241, ¶ 18 (quoting *People v. Stankewitz*, 793 P.2d 23, 41 (Cal. 1990)). In that case, the state presented evidence of two separate acts to prove one count of aggravated assault arising from a road-rage incident. *Id.* ¶¶ 1-2, 6. Klokic had pointed a handgun at the victim "once from inside his car while the cars were in motion and again after the cars had stopped and the street confrontation had begun." *Id.* ¶ 6. We noted that although both acts occurred during a single episode, Klokic had separate justification defenses for each. *Id.* ¶¶ 29, 37. And "some jurors might have concluded that one of the acts was justified, while other jurors might have concluded that the other act was justified, and a third set might have concluded that neither act was justified." *Id.* ¶ 30. We concluded that because of the real "possibility that the jury would disagree as to which of Klokic's acts gave rise to his criminal liability," they were not part of the same criminal transaction and the trial

court committed reversible error by not providing either remedial measure mentioned above. *Id.* ¶¶ 37-38.

¶26 Casado's reliance on *Klokic* is misplaced. In this case, unlike *Klokic*, there was evidence of only one criminal episode that did not include two or more separate acts. From the time he first approached E.G., Casado was holding the knife, threatening E.G. continuously, and the encounter was without interruption from start to finish. These circumstances are similar to those in *State v. Counterman*, 8 Ariz. App. 526 (1968), where the defendant was charged with a single count of assault when he fired a handgun at his mother-in-law twice; missing her the first time but hitting her the second time. *Id.* at 529. This court rejected the argument that the trial court should have required the state to elect which of the two gunshots constituted the assault and should have instructed the jury on which type of assault the defendant was being tried. *Id.* at 530. We concluded that the remedial measures were not required because the two acts were part of the same criminal transaction, and the acts could not reasonably be viewed as separate offenses. *Id.* at 531.

¶27 Similarly, we conclude in this case that no reasonable jury could fail to find that Casado committed assault under each of the three subsections in § 13-1203(A). And although he suggests he had different defenses because he "offered different explanations," we disagree. All of Casado's explanations apply to the same uninterrupted criminal episode. He therefore has not established that he was prejudiced. *See Waller*, 235 Ariz. 479, ¶ 36 (defendant not prejudiced by duplicative charging when no reasonable jury could fail to find him guilty of simple assault under different subsections).

Conviction Based on Indictment

¶28 Lastly, Casado contends that he was likely convicted of a crime for which he had not been indicted because the grand jury only heard evidence that the knife caused E.G.'s injuries and there is a "real possibility" that Casado was convicted for causing apprehension of imminent injury. Again, Casado has forfeited all but fundamental, prejudicial review because he did not object below. *See Escalante*, 245 Ariz. 135, ¶ 12.

¶29 "Few constitutional principles are more firmly established than a defendant's right to be heard on the specific charges of which he is accused." *Dunn v. United States*, 442 U.S. 100, 106 (1979). The Arizona Constitution states that "[n]o person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information

or indictment . . . ." Ariz. Const. art. II, § 30; *see also State v. Martin*, 139 Ariz. 466, 471 (1984) (noting that there are "constitutional guarantees that an accused stand trial with clear notice of the crime with which he is charged").

¶30 Casado was charged with and convicted of aggravated assault with a deadly weapon or dangerous instrument under A.R.S. § 13-1204(A)(2). As noted above, neither the indictment nor the jury verdict form specified the type of assault under A.R.S. § 13-1203(A). Casado argues that the grand jury only heard evidence that he physically injured E.G. and that no evidence that he merely threatened E.G. without any physical injury was presented. Casado asserts that because there is a "real possibility" he was convicted of merely threatening E.G. with a knife, there is a "real danger" he was convicted for actions that were not before the grand jury.

¶31 To support his argument, Casado cites *State v. Mikels*, 119 Ariz. 561 (App. 1978). In that case, the defendant was indicted for an act of sodomy that took place in a shower stall "[o]n or about the 25th day of February." *Id.* at 562. During trial, however, the victim testified that the "incident in the shower stall took place around the 12th or 13th of February" and that there was another act of sodomy that occurred on February 25 in the cell bunk. *Id.* During closing arguments the state "asked the jury to find [the defendant] guilty of the sodomy which occurred in the bunk and the defense attorney based his final argument to the jury on the same act." *Id.* From the record, it appeared the jury convicted the defendant for the act of sodomy that took place in the bunk. *Id.* As a result, this court vacated the conviction because he was convicted of a crime for which he was not indicted. *Id.* at 563.

¶32 Casado's reliance on *Mikels* is misplaced. In that case, the grand jury heard evidence relating to one crime, in a discrete location, yet the defendant was convicted of a wholly separate crime, in a different location. *Id.* at 561-63. Here, the grand jury heard evidence that supported the single alleged aggravated assault and Casado was convicted for the same assault. Contrary to Casado's contention, the grand jury heard evidence that would have supported all three types of assault under § 13-1203(A). Similarly, at trial, the state presented evidence that supported all three types of assault and proved beyond a reasonable doubt, as evidenced by the verdict form, that Casado was guilty of "AGGRAVATED ASSAULT, DEADLY WEAPON/DANGEROUS INSTRUMENT *as alleged in Count One of the Indictment*." (Emphasis added.) Therefore, because both Casado's indictment and conviction related to a single criminal transaction and the grand and trial jury were each presented evidence that supported

all three types of assault, he has failed to prove fundamental, prejudicial error.

Disposition

¶33 For the foregoing reasons, Casado's conviction and sentence are affirmed.

B R E A R C L I F F E, Judge, dissenting in part and concurring in the result:

¶34 Although I concur in the result, I do not believe the evidence of Casado's drinking (or resulting intoxication) amounts to Rule 404(b), Ariz. R. Evid., other-act evidence given that Casado failed to assert any particular character trait for which it was offered or that it proved. Unless such evidence is offered to (or simply does) prove a character trait to show action in conformity therewith, it is not impermissible other-acts evidence under Rule 404(b)(1). Instead, it is simply evidence subject to examination under Rules 401, 402 and 403, Ariz. R. Evid. Consequently, it was unnecessary for the trial court or the majority here to scrutinize it under Rule 404(b). I therefore respectfully dissent in part as explained below.

¶35 Under Rules 401 and 402, relevant evidence is admissible and irrelevant evidence is inadmissible. Rule 403 places limits on the admission of relevant evidence, barring its admission "if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Rule 404(a) further bars relevant evidence if it is "[e]vidence of a person's character or a trait of character . . . [being offered] for the purpose of proving action in conformity therewith on a particular occasion," unless offered by certain parties or under certain circumstances. Rule 404(b) then limits the use of relevant evidence of a criminal defendant's non-charged conduct (his "other acts") if it is offered to prove the defendant's character to show that, consistent with that character trait, he committed the charged act. Even so, other-acts evidence that proves the defendant's character was consistent with the charged criminal conduct may still be admissible if offered for an otherwise relevant purpose. *See* Ariz. R. Evid. 404(b)(2).

¶36 To use such evidence, the state must prove by clear and convincing evidence that the defendant committed the other act, the evidence must be offered for a proper purpose, it must be relevant, and its probative value must not be substantially outweighed by the danger of unfair prejudice. *State v. Hausner*, 230 Ariz. 60, ¶ 69 (2012). The state must

also give advance notice to the defendant of its intent to present other-acts evidence. Ariz. R. Evid. 404(b)(3).

¶37 Here, the state adduced testimony that Casado drank alcohol both before and after the charged assault and that he was intoxicated at the time of the assault. Casado claims that evidence of his drinking before and after the charged assault was other-acts evidence under Rule 404(b) and inadmissible because the state both failed to give notice of its use before trial and offered no other relevant basis for its admission.

¶38 Casado, however, fails to cogently explain what character trait this evidence betrayed. Although he claims the state offered it to show that he was a "mean drunk" and then to show that, as a mean drunk, he must have committed this charged assault, no evidence of Casado being a "mean drunk" was presented; only evidence that he drank on two occasions. The state did not, for example, introduce evidence of him getting drunk and beating up a neighbor the day before, or of him hitting his mate on occasion while in his cups. It simply offered evidence of Casado drinking before and after this particular assault. So, while Casado may have been a "mean drunk" when he assaulted this victim, there was no evidence offered of him demonstrating that character trait at any other time. And Casado has not shown that drinking alcohol as an activity demonstrates a character trait of any kind other than a character trait of liking alcohol. But Casado was not, of course, charged with an alcohol-related offense.

¶39 Because the evidence of Casado's non-charged act of drinking alcohol does not demonstrate a character trait of being a "mean drunk," the state could not have offered it, and the jury could not have reasonably accepted it, as other-act evidence to prove Casado's character to show action in conformity with being a mean drunk. And, because it does not demonstrate that character trait, it does not fall into the category of objectionable Rule 404(b) evidence in the first place. Neither the trial court, nor this court, need then take the next step and determine its admissibility for some allowable purpose.

¶40 If this evidence need not be examined under Rule 404(b), then it is simply examined first under Rules 401 and 402 for its relevancy and admissibility. *See State v. Togar*, 248 Ariz. 567, ¶¶ 14, 19 (App. 2020). "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Ariz. R. Evid. 401. And relevant evidence is—generally—admissible. Ariz. R. Evid. 402. In part, the state

asserts, it offered this evidence to explain why Casado may have assaulted the victim, loosely, his "motive." As the majority correctly determines, albeit in its Rule 404(b) examination, the evidence did bear on motive. And, if demonstrating Casado had a motive to assault the victim, it made that he assaulted the victim more likely. That fact, of course, was at issue. This evidence was therefore relevant and admissible.

¶41 Whether this relevant, admissible evidence is still otherwise excludable because, as Casado argues, it is impermissibly prejudicial, the majority also correctly determines that its probative value was not substantially outweighed by any danger of prejudice to Casado. Consequently, it was not barred under Rule 403.

¶42 In sum, because I cannot find that Casado had a basis under Rule 404(b) to object to the evidence of his drinking, there was no need for the trial court or this court to undertake the Rule 404(b) analysis. But, because I find this evidence to have been relevant and admissible and not otherwise barred, I concur in the result. As to the remainder of the majority decision, I similarly concur.