IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BRIAN KEVIN ZANDER,
Appellant.

No. 2 CA-CR 2020-0086
Filed August 16, 2021

Appeal from the Superior Court in Pima County
No. CR20184667001
The Honorable Deborah Bernini, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Hernandez & Hamilton P.C., Tucson
By Carol Lamoureux and Joshua F. Hamilton
Counsel for Appellant

MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Eppich and Chief Judge Vásquez joined (except as to paragraph 37), with Presiding Judge Eppich specially concurring in part and Chief Judge Vásquez joining in that concurrence.

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

¶1 Brian Zander appeals from his convictions after a jury trial for two counts of molestation of a child, one count of sexual abuse of a minor, and one count of contributing to the delinquency of a minor. The trial court sentenced him to concurrent sentences, the longest of which was twelve years' imprisonment. Zander contends that the court abused its discretion in admitting other-act evidence and two photographs of the victim. Zander also claims that the court abused its discretion when it amended the indictment and committed fundamental error during jury instructions and voir dire. We affirm.

Factual and Procedural Background

¶2 We review the facts in the light most favorable to upholding the convictions. *State v. Robles*, 213 Ariz. 268, ¶ 2 (App. 2006). In October 2018, Janice[1] told her volleyball coach that she had been sexually abused by Zander around September 2017, when she was ten years old. Janice and her mom were living with Zander at the time. Zander was charged with two counts of molestation of a child, one count of sexual abuse of a minor, and one count of contributing to the delinquency of a minor.

¶3 At trial, then thirteen-year-old Janice testified that Zander had given her marijuana and alcohol for the first time the week before the sexual abuse. On the day of the abuse, Zander twice again gave her marijuana. After smoking marijuana with her the second time, Zander hugged Janice and "rested" his lips on her shoulder. This made Janice "uncomfortable," so she went to bed. She woke up to Zander laying in her bed, "spooning"

[1]The victim and witnesses are identified by pseudonyms throughout this decision.

her[2] and then rubbing his hand up and down her leg and rubbing her vagina over her clothes. Zander ultimately moved his hand to "other places," grabbing her butt and rubbing her breast.

¶4 Janice said that before this she had been close with Zander, had trusted him, and considered him to be like a father figure. She enjoyed spending time with him, but after the incident, she "did not like him at all." Janice's mother, Ruby, also testified that beginning in October she had noticed Janice's attitude and relationship with Zander "changed." She related that Janice was rude and "short" with Zander, and did not want to talk or interact with him. Janice described one incident when she had been doing laundry, and Zander wanted to "play." He would not "leave [her] alone," and when she did not want to play, he chased her to the bathroom where he "squished [her] between the wall and the door." Janice said this had made her angry and they argued.

¶5 After a three-day jury trial, Zander was convicted and sentenced 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).

Analysis

Other-Act Evidence

¶6 On appeal, as he did below, Zander claims the trial court abused its discretion by admitting other-act evidence that: (1) he gave Janice marijuana and alcohol the weekend before he sexually abused her ("act one"); (2) he hugged and put his lips on Janice's shoulder ("act two"); and (3) he had previously tickled or "played" with Janice despite her protesting ("act three"). The state argues that the court properly admitted evidence of these other acts.

¶7 Before trial, the state moved to admit this evidence pursuant to Rule 404(b) and (c), Ariz. R. Evid. The state specifically claimed that other acts two and three were admissible under Rule 404(c) because the acts demonstrated that Zander had an aberrant sexual propensity toward Janice, a prepubescent girl. It also claimed that all the other acts were admissible under Rule 404(b), to show Zander's "motive, opportunity,

[2]Janice described "spooning" as "a type of cuddling. There's like, it's like pelvis to pelvis, or like pelvis to butt."

intent, preparation, plan, absence of mistake or accident and to complete the story."

¶8 After argument on the motion, the trial court ruled that act one—having provided marijuana and alcohol—was admissible to show intent, plan, and absence of mistake and was relevant to show why Janice would let Zander have contact with her again—in hopes that she might get marijuana again. It further ruled act two—Zander's lips on Janice's shoulder—was admissible to show Zander's intent, plan, and absence of mistake or accident. And lastly, that act three—the "playing"—was admissible as to intent, plan, and absence of mistake or accident as bearing on the "grooming" issue. Finally, the court stated that its findings fell under Rule 404(b), and not Rule 404(c), and that, under Rule 404(b), these acts were appropriate, relevant, and more probative than unfairly prejudicial. At trial, the state elicited this other-act evidence during Janice's testimony.

¶9 "We review a trial court's admission of evidence for an abuse of discretion." *State v. Tucker*, 215 Ariz. 298, ¶ 58 (2007). Under Rule 404(b)(1), Ariz. R. Evid., "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." This is commonly referred to as "propensity evidence." *State v. Togar*, 248 Ariz. 567, ¶ 14 (App. 2020). Other-act evidence, even if it serves a propensity purpose, may be admissible as any other type of evidence for a relevant purpose, including but not limited to, "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ariz. R. Evid. 404(b)(2); *see State v. Leteve*, 237 Ariz. 516, ¶ 11 (2015) ("When other acts evidence is offered for a non-propensity purpose under Rule 404(b), it is also subject to Rule 402's relevance test [and] Rule 403's balancing test . . . ."). 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.

¶10 As a threshold matter, the state must prove by clear and convincing evidence that the other act occurred and that the defendant committed the act. *State v. Terrazas*, 189 Ariz. 580, 584 (1997). Zander claims that the trial court failed to make the required finding that the other acts had been proved by clear and convincing evidence and indeed that the burden had not been met.[3] However, the court implicitly concluded that

[3]The state argues that because Zander "failed to object when the trial court did not expressly state that it found that the other acts were supported by clear and convincing evidence" this argument should be "reviewed for

Janice's testimony amounted to clear and convincing evidence of the acts when it stated it had reviewed the evidence and determined that an evidentiary hearing was not necessary. *See State v. Vega*, 228 Ariz. 24, ¶ 19 (App. 2011) ("Having decided to admit the testimony pursuant to Rule 404(b), the superior court necessarily concluded the testimony constituted clear and convincing evidence of the act."); *State v. Lebrun*, 222 Ariz. 183, ¶ 10 (App. 2009) (court may hold evidentiary hearing or dispense with it). A victim's testimony, such as Janice's, is sufficient to prove other acts by clear and convincing evidence. *Vega*, 228 Ariz. 24, ¶ 19. *Cf. State v. Williams*, 111 Ariz. 175, 177-78 (1974) (victim's uncorroborated testimony may provide proof beyond a reasonable doubt to support conviction).

Providing Marijuana and Alcohol

¶11 Zander argues that testimony regarding him providing marijuana and alcohol to Janice the week before the crime was inadmissible because "it was minimally probative, was not offered for a proper purpose, risked confusing the issues, and was unfairly prejudicial to Zander." The state claims the evidence is relevant to his plan to intoxicate her before touching her sexually. We agree.

¶12 Evidence of furnishing drugs to a minor may be admissible to show that "the defendant used drugs as part of his overall plan of sexual exploitation." *State v. Grainge*, 186 Ariz. 55, 58 (App. 1996) (in prosecution for sex offenses involving a minor evidence of furnishing marijuana to the minor admissible as part of defendant's plan to seduce victim). Consequently, we agree with the state that this act was relevant to "[Zander's] preparation towards his plan to 'groom' or seduce [Janice]" and to him "creating an atmosphere where he could sexually assault [Janice] without any resistance."

¶13 Additionally, we do not find that the probative value here is substantially outweighed by a danger of unfair prejudice. *See* Ariz. R. Evid.

---

fundamental, prejudicial error only." We do not agree. In his response to the state's motion to determine admissibility of the other acts, Zander claimed that the evidence was only admissible if the trial court specifically found that clear and convincing evidence existed and that none of the other acts here could be proved by clear and convincing evidence. This is sufficient to preserve the issue for appeal. *See State v. Burton*, 144 Ariz. 248, 250 (1985) ("[W]here a motion in limine is made and ruled upon, the objection raised in that motion is preserved for appeal, despite the absence of a specific objection at trial.").

403. "Unfair prejudice 'means an undue tendency to suggest decision on an improper basis,' . . . such as emotion, sympathy, or horror." *State v. Schurz*, 176 Ariz. 46, 52 (1993) (quoting Fed. R. Evid. 403, advisory committee note). Zander has pointed to nothing that suggests this evidence had a tendency to suggest a decision on an improper basis.

¶14 Zander further argues that admitting evidence of the earlier incident was improper under Rule 403 because it "risked confusing the issues" because "[s]ome of the jurors might have believed they could convict [him] for the earlier marijuana offense." However, the state explained to the jurors during opening statements that they would hear evidence that Zander gave Janice marijuana the week before the charged instance. The state told the jurors to "listen[] for" evidence of whether Zander provided Janice marijuana the night that he molested her. In closing argument, the state again differentiated between the event the week before and the charged incident. Thus, the state mitigated any potential risk of confusion by clearly explaining the conduct that resulted in Zander's charge of contributing to the delinquency of a minor. *See State v. Hamilton*, 177 Ariz. 403, 410 (App. 1993) (defendant cannot prove prejudice when state "clearly delineated during closing arguments what specific conduct constituted the offense charged in each specific count."). We thus do not find the evidence inadmissible under Rule 403.

¶15 Evidence of Zander furnishing Janice with marijuana and alcohol the week before the charged incident was properly admitted under Rule 404(b), Ariz. R. Evid. We cannot conclude the trial court erred.

Lips on Shoulder

¶16 Zander argues that "the hugging incident also should have been excluded because it was minimally probative and highly inflammatory." Zander claims this incident was introduced to "show something improper: that his actions made [Janice], a ten-year-old child, feel weird and uncomfortable." The state argues, and we agree, that the incident was properly admitted under Rule 404(b) to show "Zander's plan to try to make [Janice] more comfortable with his physical advances," to ensure later successful abuse.

¶17 Although this incident may have demonstrated inappropriate conduct by Zander, that in itself does not make it unfairly prejudicial. *See Schurz*, 176 Ariz. at 52 ("[N]ot all harmful evidence is unfairly prejudicial . . . [since] evidence which is relevant and material will generally be adverse to opponent."). The probative value of this evidence

demonstrating Zander's plan substantially outweighed any danger of unfair prejudice. It is unlikely that the jury was surprised that Zander put his lips on Janice's neck prior to sexually abusing her such that it would cause the jury to make a decision based on sympathy or prejudice. *See id*. We are unpersuaded that Janice's testimony regarding this incident resulted in an "undue tendency to suggest decision on an improper basis." *State v. Mott*, 187 Ariz. 536, 545 (1997). Thus, it was properly admitted under Rule 404(b).

Playing

¶18 Zander argues on appeal that act three—the "playing"—should not have been admitted because it was "wholly irrelevant to *any* issue because it did not tend to make it more or less likely that the earlier abuse had occurred" and "[i]ts only purpose was to make Zander look bad." The state argues that evidence of this incident tended to prove that the nature of Janice and Zander's relationship changed after the sexual abuse occurred, with this change corroborating that the sexual abuse did occur.

¶19 As described above, evidence is relevant when "it has any tendency to make a fact more or less probable than it would be without the evidence," Ariz. R. Evid. 401, and other-act evidence may be admissible under Rule 404(b) for "other purposes." The primary purpose of this testimony was, therefore, not to make Zander look like a "bad guy." Rather, Janice's testimony describing how her relationship with Zander had changed after the sexual abuse occurred—including the playing incident—provides context to their relationship and makes it more likely that something had occurred to change the nature of that relationship. Its probative value, therefore, substantially outweighed any danger of unfair prejudice, and the trial court properly admitted this other-act evidence under Rule 404(b).

Photographs of Janice

¶20 On appeal, as he did below, Zander argues that the trial court abused its discretion in admitting two photographs of Janice at the time she was sexually abused by Zander. The state argues the "two photographs depicted her appearance at the age when she was molested in order to assist the jury in understanding why she may have mixed up some of the dates and facts in her testimony—she was young."

¶21 On the second day of trial, the state moved to admit two photographs of Janice when she was ten years old. Zander objected on

relevance and Rule 403 grounds, later renewing his objection and claiming the photographs were not probative of anything but "purely an appeal to emotion." The trial court admitted the pictures "to show what [Janice] looked like at the time."

¶22 "We review a trial court's ruling on the admissibility of photographic evidence for abuse of discretion." *State v. Pandeli*, 215 Ariz. 514, ¶ 22 (2007). In such a review, we will "consider the photographs' relevance, the likelihood that the photographs will incite the jurors' passions, and the photographs' probative value compared to their prejudicial impact." *State v. McGill*, 213 Ariz. 147, ¶ 30 (2006). We will uphold the trial court's ruling if correct for any reason. *State v. Carlson*, 237 Ariz. 381, ¶ 7 (2015).

¶23 The photographs of Janice, although minimally relevant, were also only minimally prejudicial and thus the trial court did not abuse its discretion in admitting them. The state urges that photographs of Janice at the time of the crime helped the jury understand that she was indeed young when the abuse occurred. In support of its argument, the state points to the testimony of its expert witness, Dr. Wendy Dutton, who explained that young children have difficulty remembering dates and accurately recalling certain facts. The jury had already heard testimony that Janice was ten years old at the time, and Janice testified that she had been shorter then than she was at the time of trial. What Janice "looked like at the time" of the crime does not appear to be particularly probative of any fact at issue, this makes the need for the photographs marginal, at best. But, even without the photographs, it is within the common knowledge of jurors what a ten-year-old child looks like. Any excessive or prejudicial sympathies incited by use of the photographs, therefore, were merely cumulative to that common knowledge, and were marginally prejudicial, at worst. *See State v. Williams*, 133 Ariz. 220, 226 (1982) (erroneous admission of cumulative evidence constituted harmless error). We cannot say then that the danger of prejudice caused by the use of the photographs substantially outweighed any relevance. Therefore, the trial court did not abuse its discretion in admitting the photographs.

Amended Indictment

¶24 On appeal, Zander argues that the trial court abused its discretion by granting the state's pre-trial motion to amend the indictment to change the date range because the amendment prevented him from presenting an alibi defense. We review the court's ruling on a motion to amend the indictment for an abuse for discretion. *State v. Buccheri-Bianca*,

233 Ariz. 324, ¶ 16 (App. 2013). At the hearing on the state's motion to amend the indictment, Zander did not raise the argument he now makes on appeal. Rather, he asserted only that a motion to amend the indictment should not be based on expected testimony—whether that of Janice or her mother—and that the court should wait until the testimony is given. To preserve an issue for appeal, objections must be made with specificity. *See State v. Moody*, 208 Ariz. 424, n.13 (2004). However, even if Zander had properly objected and preserved the issue for appeal, he is unable to demonstrate prejudice.

¶25 Rule 13.5(b), Ariz. R. Crim. P., permits an indictment to be amended "to correct mistakes of fact or remedy formal or technical defects." "A defect may be considered formal or technical when its amendment does not operate to change the nature of the offense charged or to prejudice the defendant in any way." *State v. Bruce*, 125 Ariz. 421, 423 (1980). The defendant bears the burden of showing that he suffered actual prejudice by the amendment. *State v. Johnson*, 198 Ariz. 245, ¶ 8 (App. 2000). In determining whether the defendant was prejudiced, we consider whether the amendment violated the defendant's right to "notice of the charges against him with an ample opportunity to prepare to defend against them." *State v. Barber*, 133 Ariz. 572, 577 (App. 1982).

¶26 Zander does not claim here that the amendment changed the nature of the offense, but rather that he suffered prejudice because the amendment prevented him from presenting an alibi defense as to the entirety of the expanded date range. In the state's motion to amend, it stated that Zander had known for several months of the state's intent to amend the indictment. Zander did not dispute this at the hearing on the motion, or otherwise assert insufficient notice. We thus conclude that Zander was afforded sufficient notice of the amended date range and an opportunity to defend against the charges and offer alibi evidence for the entire date range if he had it to offer. Therefore, the trial court did not err in granting the state's motion to amend the indictment.

Jury Instruction

¶27 On appeal, Zander argues that the trial court erred in giving a *sua sponte* jury instruction that the victim of a crime has a right to refuse an interview with defense counsel. Because Zander did not object to this jury instruction at trial, we review only for fundamental, prejudicial error. *State v. Escalante*, 245 Ariz. 135, ¶ 12(2018).

¶28 Zander asserts that fundamental error occurred when the trial judge gave the following jury instruction on the last day of trial: "Under the Arizona Constitution a victim of a crime has the right to confer with the prosecutor prior to trial and to refuse an interview requested by the defense attorney." Neither party requested this instruction, and neither party objected to it. Section 13-4433(F), A.R.S., provides that "[i]f the defendant . . . comments at trial on the victim's refusal to be interviewed, the court shall instruct the jury that the victim has the right to refuse an interview under the Arizona Constitution." The state does not claim that Zander made such a comment here.

¶29 Zander has the burden to prove fundamental error occurred. *Escalante*, 245 Ariz. 135, ¶ 13. "[T]he first step in fundamental error review is determining whether trial error exists." *Id.* ¶ 21. A defendant then demonstrates that fundamental error occurred by showing that "(1) the error went to the foundation of the case, (2) the error took from the defendant a right essential to his defense, *or* (3) the error was so egregious that he could not have possibly received a fair trial." *Id.* If the defendant demonstrates fundamental error under one or two, he must make an additional showing of prejudice. *Id.*

¶30 Prejudice is a fact-intensive inquiry, in which the outcome will "depend[] upon the type of error that occurred and the facts of a particular case." *State v. James*, 231 Ariz. 490, ¶ 15 (App. 2013) (quoting *State v. Henderson*, 210 Ariz. 561, ¶ 26 (2005)). Zander must affirmatively prove prejudice, and cannot rely upon speculation. *State v. Dickinson*, 233 Ariz. 527, ¶ 13 (App. 2013). To prove prejudice, Zander must show that a properly instructed jury "could have reached a different result." *Henderson*, 210 Ariz. 561, ¶ 27.

¶31 Zander argues here that fundamental error occurred because "the instruction was wholly inapplicable and only served to unnecessarily draw attention to [Janice's] then-unestablished victim status." Even assuming the jury instruction was error, Zander does not establish prejudice. Although, to be sure, it had yet to be established by a jury verdict that a crime had been committed against Janice, her status in the case, as a constitutional matter, even before verdict, is "victim." Ariz. Const. art. II, § 2.1(A); A.R.S. §§ 13-4401 to 4443. And, although under certain circumstances referring to an accuser as the "victim" during trial is not appropriate, the use of the term is left to the trial court's discretion on a case-by-case basis. *Z.W. v. Foster*, 244 Ariz. 478, ¶ 2 (App. 2018). Here, the use of the term "victim" that Zander claims was in error was fleeting and generalized and was not directly related to Janice. At oral argument,

Zander emphasized that the court used the term on two other occasions as well. Nonetheless, we cannot say that the use of the term even three times during a three-day trial, a reasonable jury could have reached a different result. Other jury instructions made it clear that it was for the jury to decide the facts of the case and to find guilt beyond a reasonable doubt.

Voir Dire

¶32 Finally, Zander argues that the trial court made improper remarks during voir dire that deprived him of his constitutional right to a fair trial before an impartial jury. The state argues that the court's complained-of remarks were proper.

¶33 During jury selection, the trial court told prospective jurors that it expected the trial to last three days, which it considered a short trial, and noted that some trials last much longer than that. The court then explained that if it were to excuse a potential juror from this trial, he or she would be sent back to the jury assembly room to again be asked the same questions in a different jury trial. It further noted that there was currently an eight-day trial on a contract dispute that each of them could be selected for if excused from this trial.

¶34 The trial court then excused several jurors that had indicated that they had hardships, and called replacement jurors. The court asked replacement juror A.C. if she had any "yes" answers to the court's questions thus far, to which A.C. responded, "Maybe to the hardship but I don't want to go to another courtroom so no." The court questioned whether A.C. was sure, and A.C. responded affirmatively. The court later excused A.C. on a different basis, stating "[t]hank you for your candor. I'm sending you downstairs. They really do need jurors for that lengthy civil trial." And to other excused jurors, the court noted, "They've got that civil trial waiting for you" and "I think they are still sending jurors to that afternoon contract job." Lastly, juror J.G. stated that she "kind of" had a hardship but she did not "want a chance of going anywhere else" and that she could be fair to the defendant. Defense counsel later struck J.G. from the jury.

¶35 Zander claims "the trial court's remarks about the civil trial downstairs were improper because they discouraged prospective jurors from responding candidly and openly to questions during voir dire." Because Zander did not object at trial to any of the trial court's remarks, we review only for fundamental, prejudicial error. *Escalante*, 245 Ariz. 135, ¶ 12. Zander, however, argues that prejudice should be presumed here because the court's remarks amounted to structural error. He claims that

"[a] complaint that a trial court's remarks or action tainted the entire prospective jury pool is not amenable to harmless error review or a traditional prejudice analysis." We do not agree.

¶36 "Structural errors, as opposed to trial errors, are those which 'deprive defendants of basic protections without which a criminal trial cannot reliably serve its function as a vehicle for guilt or innocence.'" *Henderson*, 210 Ariz. 561, ¶ 12 (quoting *State v. Ring*, 204 Ariz. 534, ¶ 45 (2003)). There are "relatively few instances" of error which have been defined as structural. *Ring*, 204 Ariz. 534, ¶ 46. Errors are considered structural when they "affect the 'entire conduct of the trial from beginning to end'" and "affect the legitimacy of the entire proceeding." *State v. Anderson*, 197 Ariz. 314, ¶ 22 (2000) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 309-10 (1991)). Error is fundamental when it reaches the foundation of the case, takes from the defendant a right essential to his defense, or is an error of such a magnitude that the defendant could not have possibly received a fair trial. *Escalante*, 245 Ariz. 135, ¶ 13.

¶37 Zander does not claim on appeal that the trial court misled the potential jurors about the possibility of them having to serve on the jury panel of a different, and longer, case. The court excused a number of jurors who claimed they had a hardship. It further ensured that each juror was able to be fair and impartial. I find no error, much less fundamental or structural error, in the trial court—we can only assume—accurately explaining how the jury selection process works and that a juror excused from one case could be held to serve in another.

Disposition

¶38 For the foregoing reasons, we affirm Zander's convictions and sentences.

E P P I C H, Presiding Judge, specially concurring, with Chief Judge Vásquez joining:

¶39 I write separately to address the propriety of the trial court's comments during jury selection and the conclusion reached in paragraph 37 above. While I agree that those comments did not constitute structural error, and that there has not been a showing of prejudice warranting reversal, when taken as a whole the comments were, in my view, erroneous.

¶40 Having informed the jury pool that the trial of this matter was expected to last only three days, and noting that it routinely conducted

trials lasting much longer, the court, before asking prospective jurors about hardship or biases warned them as follows:

> If I excuse you from this jury trial I then have to order that you go back downstairs to the first floor jury assembly room where you started early this morning. That is not punishment for your answer. That's where I absolutely have to send you.
>
> And when you get back downstairs to the jury assembly room I guarantee you that at least one more time if not two more times you're going to be put together with another group of prospective jury members. You're going to go to another courtroom with a different judge, different lawyers, a different case.
>
> You're going to be asked the same question by that other judge that I asked you that when you gave me your answer I thought it was the best reason I had ever heard to excuse somebody from jury duty only to have that other judge have a different opinion about your response.
>
> And that could result in me excusing you from a three-day jury trial, which . . . means that you could go downstairs, go to another courtroom and get selected to sit on a jury trial that's expected to last much longer than this one.
>
> In fact there's an eight-day contract dispute [that is going through jury selection today]. They're not even starting jury selection until this afternoon and I've been asked by my colleague to get all my extra jurors downstairs as fast as I can so that they can pick the jury that they're going to need for a lengthy trial arguing contract law and that's going to be in another courtroom with another judge.
>
> So with that little happy bit of information if I could see a show of hands for those of you that it would be impossible for you to sit with us or

> it would really be an inconvenience that would keep your mind off of what you need to listen to here.[4]

¶41 After excusing a juror who claimed a hardship the trial court called A.C. to the panel. The full exchange between her and the judge warrants consideration. When the court asked A.C. if she had any "yes" answers to its questions, she responded, "Maybe to the hardship but I don't want to go to another courtroom so no." The court replied: "All right. Yeah, I don't want to do an eight-day contract dispute but are you sure? Because they are going to need—you're here until 5:00 and we just keep sending you to courtrooms until we get all of our jury trials seated with jurors who are fair, open-minded and able to hear the case. Are you sure?" The juror responded, "Um, yeah." As noted above, prospective juror J.G. made similar comments. In excusing other prospective jurors, the court repeatedly made reference to the likelihood of being selected for the lengthier civil trial.

¶42 There was certainly no error in the trial court informing jurors that if they were excused from serving in this case they were required to return to the jury assembly room and might be selected for another jury. But the court's comments went beyond merely conveying information; they created a risk that jurors would be less than forthcoming during the voir dire process. *Cf. In re S.C. Press Ass'n*, 946 F.2d 1037, 1042 (4th Cir. 1991) ("If the *voir dire* is to serve its function as the safeguard of the defendant's sixth amendment rights, then clearly candor must be the hallmark of such a proceeding.").

---

[4]This admonition, as well as the court's similar comments when excusing jurors, were undoubtedly intended to discourage specious claims of hardship or bias by members of the jury pool who might be reluctant to serve. I recognize the unfortunate fact that a not insubstantial number of those summoned are unappreciative of their civic responsibility and view jury service as akin to a painful dental procedure. *See* Thomas L. Fowler, *Filling the Box: Responding to Jury Duty Avoidance*, 23 N.C. Cent. L.J. 1, 3 (1997-98) ("Since colonial days, citizens have sought to avoid jury duty."). I also appreciate the challenges such persons pose to trial judges in seating an adequate number of fair and impartial jurors. *See Azucena v. State*, 448 P.3d 534, 538 (Nev. 2019). Nevertheless, courts must exercise care so as to not taint the selection process. *See id.* at 538-39.

¶43 That the trial court's comments were truthful is irrelevant. The issue, as framed by Zander, is whether the repeated admonition that providing an answer that might disqualify a juror from serving in this matter and instead be forced to sit on a longer trial had an impermissible chilling effect on jurors' willingness either to claim hardship[5] or, more importantly, to disclose possible biases. That jurors may have been disinclined to be forthcoming in their answers as result of the court's comments is evident from the answers of A.C. and J.G. That neither of those jurors were actually impaneled in this matter is of no moment in determining whether the comments constituted error. Their responses suggest that the court's comments discouraged openness.

¶44 There having been no objection to the comments at trial, the question is whether the error was fundamental and prejudicial. *See Escalante*, 245 Ariz. 135, ¶ 12. Error is fundamental if it (1) goes to the foundation of the case, (2) takes from the defendant a right essential to his defense or (3) is so egregious that a defendant could not have possibly received a fair trial. *Id*. ¶¶ 13-17 (clarifying proper application of the three-prong test under *Henderson*). In order to be entitled to relief under the first or second "prong" of the test, a defendant must establish not only that the error was fundamental, but that it was prejudicial as well. *Id*. Because error under "prong three" must have so profoundly distorted the trial that injustice is obvious, there is no need to further consider prejudice to warrant relief. *Id*. ¶ 20.

¶45 Zander cites two cases from other jurisdictions in support of his argument that we should presume prejudice. Each is distinguishable.

¶46 In *Azucena v. State,* the trial judge accused a prospective juror of fabricating an excuse to get out of jury duty, yelled at her, berated her (going so far as to accuse her of wanting to "throw out our entire justice system because you don't want to be fair and impartial"), warned the venire of repercussions if a prospective juror were to change what he or she had previously said in order to avoid serving, and threw a book at the wall. 448

[5]Although seating a juror who claims hardship does not ordinarily deprive a defendant to a fair trial, *see, e.g.*, *State v. Clayton*, 109 Ariz. 587, 592 (1973) (no error in retaining juror who claimed hardship), a juror with a legitimate hardship claim could, in certain circumstances, be distracted and thus miss crucial testimony, as suggested in the trial court's admonition.

P.3d 534, 536-38 (Nev. 2019). Unsurprisingly, no members of the venire thereafter expressed an inability to be impartial. *Id.*

¶47 Similarly, in *United States v. Rowe*, 106 F.3d 1226, 1228-29 (5th Cir. 1997), the trial judge ridiculed two prospective jurors who expressed an inability to be fair due to their relationship to law enforcement officers. Although she excused both jurors, she directed that each of them be required to repeatedly report for jury duty for several months. *Id*. She admonished one to "figure out how to put aside your personal opinions and do your duty to your country as a citizen, because this kind of answer which is clearly made up for the occasion is not really great." *Id.* at 1228. She told the other that it was "appalling" that she would come into court and presume people were guilty, and suggested that she make "some remedial constitutional inquiries" prior to returning. *Id.* After trial but before sentencing, in support of an unsuccessful motion for new trial, defense counsel proffered the testimony of a member of the venire panel that she felt intimidated into silence by the court's comments. *Id*. at 1228-29.

¶48 The egregious comments in *Azucena* and *Rowe* bear no similarity to the comments at issue here. I am unpersuaded by Zander's suggestion that no showing of prejudice is necessary in the instant matter, because the error cannot be accurately characterized as being of such magnitude to constitute structural error or fundamental error under the third prong of *Henderson*.

¶49 Less clear is whether Zander is correct in his assertion that the trial court's comments constituted fundamental error under the first prong of *Henderson*, as going to the foundation of the case.[6] Specifically, he contends the comments deprived him of constitutionally guaranteed procedures designed to ensure the selection of a fair and impartial jury.[7] *See Escalante*, 245 Ariz. 135, ¶ 18 (deprivation of constitutionally guaranteed procedures goes to "foundation of case"). But even assuming he has

[6]Zander does not claim that the comments resulted in fundamental error under the second *Henderson* prong.

[7]I take Zander's argument here to be distinct from, although perhaps related to, a claim that he was actually deprived of a fair and impartial jury, for which no showing of prejudice would be required. *See Escalante*, 245 Ariz. 135, ¶¶ 17, 20 (prongs of test often overlap and application depends on fact-intensive inquiries).

established fundamental error, he has failed to establish prejudice warranting reversal.

¶50 Defense counsel was afforded a full opportunity to voir dire the jurors, and there is no evidence that any of those who were selected to serve were unqualified. Moreover, the trial court's comments notwithstanding, a number of prospective jurors were forthcoming as to claims of both hardship and bias, suggesting that the potential risk caused by the comments did not come to fruition. Accordingly, Zander is not entitled to relief on this issue.

¶51 I fully concur in our resolution of the remaining issues on appeal.