IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

DAVID NOWAK,
Appellant.

No. 2 CA-CR 2020-0203
Filed October 29, 2021

Appeal from the Superior Court in Cochise County
No. CR201900202
The Honorable James L. Conlogue, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
By Joshua C. Smith, Assistant Attorney General, Phoenix
Counsel for Appellee

Emily Danies, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 David Nowak appeals from his convictions and sentences for three counts of indecent exposure, one count of furnishing harmful material to minors, and one count of involving a minor in a drug offense. On appeal, Nowak contends the trial court erred in (1) denying his motions for a mistrial and a new trial on the basis of statements made by the prosecutor; (2) denying his motion for judgment of acquittal on the count for involving a minor in a drug offense; and (3) admitting other-act evidence. For the following reasons, we affirm Nowak's convictions and sentences.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *See State v. Dunbar*, 249 Ariz. 37, ¶ 2 (App. 2020). In April 2018, Nowak, who had been diagnosed with multiple sclerosis (MS) and whose right side of his body "is pretty much non-functional," had his fourteen-year-old daughter, H.N., take photographs of his penis. He wanted H.N. to send the photographs to her friends to "know what they thought of his penis." In the winter of 2018, Nowak provided marijuana in a pipe to N.R., his fourteen-year-old neighbor and friend of his daughter.

¶3 Nowak was convicted as described above and sentenced to concurrent prison terms for four of the counts—the longest being three years—to be served consecutively to a thirteen-year prison term for another count. This appeal followed. We have jurisdiction over Nowak's appeal of his conviction and sentence pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).[1]

[1]Although neither party has challenged our jurisdiction on appeal, we have an independent obligation to assess it. *See State v. Bayardi*, 230 Ariz. 195, ¶ 6 (App. 2012). In his opening brief, Nowak challenges the trial court's denial of his motion for a new trial, filed pursuant to Rule 24.1, Ariz. R. Crim. P. Nowak was sentenced on October 7, 2020. He filed his notice of appeal, appealing from the "judgment of guilt and sentence entered," the

Discussion

Denial of Motions for Mistrial and "Prosecutorial Misconduct"[2]

¶4 Nowak first contends the trial court abused its discretion by denying his motions for a mistrial because the prosecutor made improper comments during rebuttal closing argument that resulted in cumulative "prosecutorial misconduct."[3] We review the denial of a motion for mistrial

---

same day. The order denying his motion for a new trial was filed on October 8, 2020. He filed an amended notice of appeal on October 19, 2020, but that amended notice also appealed solely from the "judgment of guilt and sentence entered" and therefore did not encompass the denial of the motion for a new trial. The denial of a motion for a new trial is separately appealable from an appeal from a judgment of conviction. *See* § 13-4033(A)(1), (2). Because his amended notice of appeal did not encompass the denial, we lack jurisdiction to consider the denial of his motion for a new trial. *See* Ariz. R. Crim. P. 31.2(h) ("If the superior court enters an order granting or denying relief under Rule 24 after a notice of appeal . . . has been filed, a party seeking review of the order must file an amended notice no later than 20 days after entry of the order."); Ariz. R. Crim. P. 31.2(c)(1) ("A notice of appeal . . . must identify the order, judgment, or sentence that is being appealed.").

[2]Per our supreme court's guidance, we note the difference between prosecutorial misconduct and error—inadvertent "'error' which may not necessarily imply a concurrent ethical rules violation, and 'misconduct,' which may suggest an ethical violation." *State v. Murray*, 250 Ariz. 543, ¶ 12 (2021) (quoting *In re Martinez*, 248 Ariz. 458, ¶ 47 (2020)). Finding neither misconduct nor error here, we need not categorize the prosecutor's conduct.

[3]The state also points to instances when Nowak objected at trial during the prosecutor's initial closing argument. However, on appeal, Nowak does not direct us to those instances, focusing solely on the objections made in the rebuttal argument. Therefore, any argument regarding the prosecutor's initial closing argument is waived on appeal. *See State v. Vargas*, 249 Ariz. 186, ¶¶ 13, 15 (2020) (to properly raise a claim of cumulative prosecutorial misconduct, appellant must "cite[] to specific instances of alleged misconduct in the record" and failure to develop may result in waiver); *see also* Ariz. R. Crim. P. 31.10(a)(7)(B) ("for each issue,"

due to alleged prosecutorial misconduct for an abuse of discretion. *State v. Jones*, 197 Ariz. 290, ¶ 20 (2000).

¶5 During the rebuttal, the prosecutor made the following statements:

> You have heard evidence from [H.N.] as to how these photos occurred. Her testimony was that [Nowak] while drunk had her take them, he had her take them so that she could pass them around to her friends. That is the evidence that has been presented in this trial. There is not evidence of anything else.
>
> . . . .
>
> . . . The only evidence you have is [H.N.]'s testimony. You have no evidence that anybody else was asked to take these photos. . . .
>
> . . . .
>
> You have no evidence that the man in the photos is anyone—
>
> . . . .
>
> And I'm not saying the defense has to present evidence, I'm saying you don't have evidence.
>
> . . . .
>
> So there is no evidence that anyone other than [H.N.] used the massager on [Nowak's] penis.[4]

---

opening brief must include "references to the record on appeal where the issue was raised and ruled on").

[4]This particular statement was relevant to a count for which the jury acquitted Nowak. Typically, a defendant is precluded from raising an argument on appeal regarding a count for which he was acquitted. *See State*

> . . . .
>
> . . . The evidence that you have is that that is when they were taken and they were taken by his daughter. There is no evidence of any other date.
>
> . . . .
>
> The defense has suggested that for the indecent exposure counts, the photos . . . that [Nowak] was unconscious. Again, there is no evidence of that—

After each of these statements, Nowak objected on the grounds of burden shifting, and moved multiple times for a mistrial. Each time, the trial court overruled the objection and denied the motion.

¶6 On appeal, Nowak renews his argument that the prosecutor's statements during rebuttal closing argument improperly shifted the burden to him. He thus asserts that the trial court abused its discretion in denying his mistrial motions. Nowak also asserts that the prosecutor's comments improperly drew attention to his failure to testify, and therefore the court abused its discretion in denying his motion for a new trial. As explained above, we do not have jurisdiction to review the denial of his motion for a new trial, and because Nowak first objected to the improper comment on his failure to testify in his motion for new trial, we review his claim on this ground for fundamental error.[5] *See State v. Rutledge*, 205 Ariz. 7, ¶¶ 26, 29-30 (2003) (objection on burden shifting did not preserve a claim of prosecutorial misconduct for comments on defendant's failure to testify); *State v. Davis*, 226 Ariz. 97, ¶ 12 (App. 2010) (an issue raised for the first time

---

v. Fristoe, 251 Ariz. 255, n.7 (App. 2021). However, because Nowak's argument is not regarding the merits of that count, but rather the prosecutor's comment that "there is no evidence," for the purposes of our analysis, we consider the statement.

[5]Because Nowak did not argue fundamental error in his brief, in our discretion, we could conclude he waived this argument. *See Vargas*, 249 Ariz. 186, ¶¶ 21-22. However, because "an improper comment on a defendant's failure to testify" is, in many cases, fundamental error, we address the argument here. *State v. Rutledge*, 205 Ariz. 7, ¶ 32 (2003).

in a motion for new trial does not preserve it for appeal); *State v. Martinez*, 210 Ariz. 578, n.2 (2005) (defendant may raise a claim for the first time on appeal but forfeits relief absent fundamental error). Nevertheless, we find no error here.

¶7 In considering whether to grant a mistrial for prosecutorial misconduct, the trial court should consider if the prosecutor called attention to matters the jury should not consider and the probability the jury was influenced by the remarks. *State v. Newell*, 212 Ariz. 389, ¶ 60 (2006). "To warrant reversal, the prosecutorial misconduct must be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *Id.* ¶ 61 (quoting *State v. Lee*, 189 Ariz. 608, 616 (1997)).

¶8 In a criminal trial, the state is required "to prove every element of a charged crime beyond a reasonable doubt." *State v. Johnson*, 247 Ariz. 166, ¶ 149 (2019). Therefore, it "improperly shifts the burden when it implies a duty upon the defendant to prove his innocence or the negation of an element, and otherwise errs when it comments upon the failure of a defendant to testify or present a defense." *Id.* (citations omitted).

¶9 Any comment, direct or indirect, on the defendant's decision not to testify violates the United States and Arizona Constitutions, *Rutledge*, 205 Ariz. 7, ¶ 26, but a prosecutor's comment on a defendant's failure to present exculpatory evidence to support his theory of the case is proper and does not shift the burden of proof, so long as the comment is not directed at the defendant's choice not to testify, *State v. Riley*, 248 Ariz. 154, ¶ 53 (2020); *State v. Sarullo*, 219 Ariz. 431, ¶ 24 (App. 2008). However, "when it appears that the defendant is the only one who could explain or contradict the evidence offered by the state," a prosecutor's comment that the state's evidence is uncontradicted is objectionable. *State v. Still*, 119 Ariz. 549, 551 (1978). "Whether a prosecutor's comment is improper depends upon the context in which it was made and whether the jury would naturally and necessarily perceive it to be a comment on the defendant's failure to testify." *Rutledge*, 205 Ariz. 7, ¶ 33.

¶10 Here, the prosecutor's general statements that, "[t]here is not evidence of anything else," "there is no evidence," "[y]ou have no evidence," and "[t]he evidence that you have is," did not directly comment on Nowak's failure to present evidence or testify. Nor does the record reflect that the prosecutor's body language directed the comments at Nowak in any manner. *See Still*, 119 Ariz. at 551 (error where prosecutor, while commenting on a conversation only defendant and state's witness

were privy to, pointed at defense table and said he "never heard an explanation" for the conversation).

¶11 Moreover, to the extent the comments indirectly implicated Nowak's failure to present evidence, the argument was proper rebuttal. In his closing argument, Nowak did not merely argue that the state had not produced evidence to prove his guilt beyond a reasonable doubt, but also advanced an alternative theory—that he had been unconscious when the photographs were taken. He specifically raised possible ulterior motives H.N. may have had to take the photographs, including her desire to live with her mother and her prior use of illicit photographs to bully others. He challenged when the photographs had been taken and disputed his use of the massager. It was then permissible for the prosecutor, in rebuttal, to point out to the jury that there was no corroborating evidence of Nowak's theories and that they must decide the case based on the evidence before them. *See State v. Martinez*, 130 Ariz. 80, 82-83 (App. 1981) (no Fifth Amendment violation when argument points out no evidence to support defense theory, rather than directs attention to defendant's failure to testify); *State v. Dansdill*, 246 Ariz. 593, ¶ 50 (App. 2019) ("to properly rebut the defendant's argument, the prosecutor had no choice but to address a topic that necessarily triggered [the inference that defendant was the best possible witness]"). Taken in context, the comments did not shift the burden to Nowak because they did not imply a duty upon him to prove his innocence or negate an element, *see Johnson*, 247 Ariz. 166, ¶ 149, rather, they properly argued what the evidence in the record was, and what it was not, *see Riley*, 248 Ariz. 154, ¶ 53.

¶12 In addition, the trial court reminded the jury during the prosecutor's argument that they had been instructed that "a defendant is not required to produce evidence of any kind and the State must prove guilt beyond a reasonable doubt on the evidence. The defendant's decision not to produce any evidence is not evidence of guilt." *See Newell*, 212 Ariz. 389, ¶ 68 (jury presumed to follow court's instructions). The prosecutor also told the jury, "[a]nd I'm not saying the defense has to present evidence, I'm saying you don't have evidence."

¶13 Furthermore, although Nowak might have been the only person who could contradict some of the state's evidence to which the prosecutor directed his comments, his defense at trial undermines his argument on this point on appeal. Nowak argued in his defense that he was unconscious when the photographs were taken and thus, would have been unable to testify as to what occurred, even if he had not invoked his

right under the Fifth Amendment. Prosecutors are urged to "refrain from venturing even close to commenting on a defendant's exercise of the significant rights protected by the Fifth Amendment." *State v. Parker*, 231 Ariz. 391, ¶ 68 (2013). However, based on the content and context of the statements here, the jury would not naturally and necessarily perceive them to be a comment on Nowak's failure to present evidence or testify. *See Rutledge*, 205 Ariz. 7, ¶ 33; *Dansdill*, 246 Ariz. 593, ¶¶ 42, 49-50 (mistrial not justified where prosecutor stated defendant was not "obligated to do anything" but "if he wants to suggest it's in evidence, then he's got to put it on the witness stand" and emphasized defendant best knew the content of certain calls, and told jury if the calls were exculpatory they "would have been hearing about them from the witness stand," because such argument was necessary rebuttal to defendant's summation).

¶14 Accordingly, the trial court did not abuse its discretion in denying Nowak's motion for a mistrial because the prosecutor did not shift the burden of proof when he argued that no evidence supported Nowak's alternative theory of the case. And as to any alleged infringement of Nowak's Fifth Amendment right to refuse to testify, we find no error, fundamental or otherwise.

Rule 20, Ariz. R. Crim. P., Motion

¶15 Nowak next asserts the trial court erred in denying his Rule 20 motion for judgment of acquittal on the count of involving a minor in a drug offense. *See* A.R.S. § 13-3409. We review the denial of a Rule 20 motion de novo, the relevant inquiry being "whether the record contains 'substantial evidence to warrant a conviction.'" *State v. West*, 226 Ariz. 559, ¶¶ 14-15, 19 (2011) (quoting Ariz. R. Crim. P. 20). In answering this question, we view the evidence in the light most favorable to sustaining the verdict, asking if "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* ¶¶ 15-16, 18 (quoting *State v. Mathers*, 165 Ariz. 64, 66 (1990)). We do not reweigh evidence or assess witness credibility. *State v. Buccheri-Bianca*, 233 Ariz. 324, ¶ 38 (App. 2013). When reasonable minds could differ on the inferences to be drawn from facts, the court has no discretion to grant a Rule 20 motion and the case must be submitted to the jury. *West*, 226 Ariz. 559, ¶ 18; *see State v. Toney*, 113 Ariz. 404, 408 (1976) ("Evidence is not insubstantial simply because testimony is conflicting or reasonable persons may draw different conclusions from the evidence.").

¶16 At the close of the state's case-in-chief, Nowak moved for a judgment of acquittal on the aforementioned count, arguing the state had

produced no evidence of possession of a prohibited substance—here, marijuana—or that he knew N.R., his fourteen-year-old neighbor, was under the age of eighteen. The trial court denied the motion. Following the guilty verdict in which the jury specifically made a finding that N.R. had been under the age of fifteen at the time of the offense, Nowak renewed his motion on the same grounds. The court did not clearly rule on the post-trial motion, but in the absence of a clear ruling, we deem the motion denied. *See State v. Mendoza-Tapia*, 229 Ariz. 224, ¶ 22 (App. 2012).

¶17 On appeal, Nowak argues that the trial court erred in denying these Rule 20 motions, reasserting that the state failed to produce evidence that he was in possession of marijuana. And he now asserts that the state not only failed to produce evidence that he had known N.R. was under the age of eighteen, but that it failed to produce evidence that he had known N.R. was under the age of fifteen.

¶18 As relevant here, the crime of involving or using a minor in a drug offense requires proof that the defendant knowingly "transfer[red]" or "offer[ed] to" transfer a substance where "possession is prohibited" to a minor person. *See* § 13-3409(A)(2). Possession of marijuana is prohibited under § 13-3409. *See* A.R.S. § 13-3405. If the minor is under the age of fifteen, the defendant's sentence may be enhanced as a dangerous crime against children. § 13-3409(B); *see* A.R.S. § 13-705.

¶19 Although Nowak argues the evidence here was insufficient, the record belies this argument. Viewed in the light most favorable to sustaining the verdict, there was substantial evidence to warrant the conviction. *See West*, 226 Ariz. 559, ¶ 14; *see also State v. Spears*, 184 Ariz. 277, 290 (1996) ("Substantial evidence is proof that reasonable persons could accept as sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt.").

¶20 Nowak first contends the evidence was insufficient to show he was in "possession" of the marijuana to prove the crime of involving or using a minor in a drug offense. To support his argument that the state was required to prove "possession," he cites cases in which Arizona courts have held that possession of a prohibited substance is a lesser-included offense of transportation of a prohibited substance, and argues the same should apply to this offense. *See State v. Cheramie*, 218 Ariz. 447, ¶¶ 9-12 (2008) (jury instruction proper because cannot transport drugs without possession); *State v. Chabolla-Hinojosa*, 192 Ariz. 360, ¶¶ 12-13, 21 (App. 1998) (double jeopardy violation where conviction for possession charge incidental to transportation for sale charge); *State v. Moroyoqui*, 125 Ariz. 562, 564 (App.

1980) (same). He cites no authority that "possession" is an element of § 13-3409 or that a possession offense is a lesser-included offense of the crime of involving or using a minor in a drug offense. Indeed, unlike transportation of a prohibited substance, on a plain reading of the statute, involving or using a minor in a drug offense could be completed without possession. *See* § 13-3409(A). But in any event, the evidence here was sufficient to support a finding that Nowak had possessed the marijuana. *See State v. Murphy*, 117 Ariz. 57, 61 (1977) (possession of marijuana may be shown by direct or circumstantial evidence and requires proof the defendant had knowledge of the drug's presence, it was in fact marijuana, and defendant exercised some control over it—mere presence is not enough).

¶21 At the time of trial, N.R. was sixteen years old. She identified Nowak as her neighbor, and stated that she had been to his apartment, where he provided her marijuana in a pipe. After arresting Nowak, a detective collected "a silver smoking device, smoking pipe commonly used to smoke marijuana" that had "residue consistent with the odor and sight of marijuana." At trial, N.R. identified this as the pipe Nowak had provided her. She stated that this instance occurred during the winter of 2018 when she was "about 14," a timeline consistent with her birthdate.[6] Although she could not remember who handed her the pipe, she stated that she, H.N., and Nowak were smoking from the pipe together, and that she could identify the substance as marijuana because she was "familiar with the smell and the look of it," and it had smelled like marijuana she had smelled before.

¶22 Nowak's sister also testified that she had observed Nowak smoking marijuana with H.N. and N.R. at the apartment "around the winter of 2018/2019 time frame." She stated that she had seen them "passing the pipe around" in Nowak's bedroom and that she had known it was marijuana because of the "smell" and because "there was marijuana in the pipe." She stated that when she had come into the room, H.N. and N.R. started to leave, but Nowak told them "[she is] cool," and then they stayed and continued to smoke. The evidence links the marijuana to Nowak such "that a reasonable inference may arise that [he] knew of [its] existence and of its whereabouts," *Murphy*, 117 Ariz. at 61 (quoting *State v. Carr*, 8

[6]N.R. also testified that this incident happened around of the time of her birthday, which was in May. But we view any inconsistencies in the testimony in the light most favorable to the prosecution. *See West*, 226 Ariz. 559, ¶ 16.

Ariz. App. 300, 302 (1969)), and had control over or the right to control the substance, *State v. Curtis*, 114 Ariz. 527, 528 (App. 1977).

¶23 Nowak also contends the evidence is insufficient because the state did not produce any physical evidence of the marijuana or conduct any tests on the pipe to determine the prior presence of marijuana.[7] But evidence need not be physical or scientific to be "substantial," and the testimony above was sufficient to establish the substance Nowak gave N.R. was marijuana. *See State v. Hall*, 204 Ariz. 442, ¶ 49 (2003) (proper denial of Rule 20 motion, in part, because physical evidence not required); *State v. Nightwine*, 137 Ariz. 499, 503 (App. 1983) (sufficient evidence supported cocaine conviction although drug not seized nor chemically tested); *see also State v. Jonas*, 162 Ariz. 32, 34 (App. 1988) (counsel not ineffective for failing to move for directed verdict on transferring marijuana to a minor charge because sufficient evidence identified the substance as marijuana: defendant told the minor it was "good stuff," minor testified that marijuana cigarette had been "passed around," "smoked by himself, the defendant, and defendant's brother," and that the cigarette made him "dizzy").

¶24 Nowak further asserts the evidence was insufficient to show that he had known N.R. was under the age of fifteen. We agree with Nowak that a conviction under § 13-3409(A)(2) requires proof that the defendant knew that the minor was under the age of eighteen, *see State v. Medina*, 172 Ariz. 287, 288-89 (App. 1992). To enhance Nowak's sentence, the minor must have been under the age of fifteen at the time of the offense. § 13-3409(B). However, Nowak cites no authority, nor have we found any, for his assertion that § 13-3409(B) requires that a defendant know that a minor is under the age of fifteen to be subjected to an enhanced sentence. But even assuming, without deciding, that this is required, the evidence that Nowak knew N.R. was a minor under fifteen was substantial. During an interview with detectives, which was admitted into evidence without objection during the state's case-in-chief, Nowak referred to H.N.'s best friend who had "been staying at [his] house with [them] like [his] next daughter." He said, "[s]he's 14 years old." He stated that he was good friends with her dad and that he may want the detectives to speak with her.

---

[7] The state attempted to introduce physical evidence of other marijuana a detective had collected from the back of Nowak's wheelchair, but Nowak objected, arguing it was not relevant because the marijuana collected "wasn't the marijuana that [N.R.] smoked." The trial court sustained the objection.

¶25 In that interview, Nowak did not refer to N.R. by name, but in another interview with officers, also admitted into evidence, Nowak named N.R., stating that she and H.N. were "inseparable"; that N.R. "practically lived in [their] house with [them]"; that he wanted N.R. to speak to detectives; and that he had spoken to her dad about that possibility. Taking this evidence together and viewed in the light most favorable to sustaining the verdict, substantial evidence supported that Nowak had known N.R. was a fourteen-year-old minor, and as discussed above, also supported the other elements of the conviction, such that "*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *West*, 226 Ariz. 559, ¶¶ 14-19 (quoting *Mathers*, 165 Ariz. at 66). Accordingly, the trial court did not err in denying Nowak's Rule 20 motions. *See id.* ¶ 14.

Rule 404(b) Evidence

¶26 Nowak's final argument on appeal is that the trial court erred in admitting evidence of his other acts pursuant to Rule 404(b), Ariz. R. Evid. We review a trial court's ruling on the admissibility of other-act evidence for an abuse of discretion. *State v. Payne*, 233 Ariz. 484, ¶ 56 (2013).

¶27 Prior to Nowak's trial, the state provided notice that it intended to introduce Rule 404(b) evidence. The state sought to introduce that Nowak had "made comments to multiple individuals concerning his virility and the functioning of his penis" and that he "makes it a point for people to know that despite his disability, he has functioning genitalia." It asserted the evidence would be presented to contradict Nowak's claims that "he did not intend for [H.N.] to photograph his penis," "had no knowledge of the photographs being taken," and that "any display of his penis to [H.N.] would have been purely accidental." It further asserted the evidence provided "necessary context" for Nowak asking H.N. to take the photographs and "show the pictures to her friends so that they could assess it," and that the evidence would be "no more prejudicial than the evidence already being presented."

¶28 The trial court held a hearing regarding the evidence during which the state presented the witnesses and testimony it intended to elicit at trial. The first witness testified that she was a case manager for the Department of Child Safety (DCS). She discussed an instance when she had picked Nowak up from the hospital and he made comments to her that his penis "still worked" because "he wasn't taking the normal medication for his [MS], he was smoking marijuana, something like that" and that "[w]hatever he was doing, he still had the function of his penis." She also

testified that when she had put her arms around him to help him out of the car, "he was saying how he liked the way [she] felt." The next witness was a prior DCS case manager. She testified to an instance when Nowak had been "talking about his wheelchair that he was trying . . . and essentially made a comment that he felt that it works, that his electric wheelchair—and then he changed, don't take words from my crotch," which she understood to mean Nowak wanted her to know that his penis was working.

¶29 Nowak objected to this evidence, asserting it was completely irrelevant, prejudicial, and "absolutely designed to sway the jury in an inappropriate fashion"—arguing the state was proposing to call witnesses to "show that [he] talked with them about his penis" and "essentially to show that he's a jerk, . . . that's not what this case is about." The state disagreed with Nowak's contention that it intended to make him look like a "jerk" and argued the evidence consisted of limited comments on a specific issue. The trial court ruled the DCS workers' testimony was admissible under Rule 404(b). It concluded the prior acts were proven by clear and convincing evidence, were relevant, and were "probative of motive, absence of mistake or accident" because Nowak's defense was that he had not been "aware his penis was exposed when the photographs" were taken. The court further concluded the other acts were "not criminal in nature and there is no unfair prejudice in admitting the witness' testimony in this regard," noting the testimony was "very limited and not misleading."

¶30 On appeal, Nowak argues this ruling was erroneous because the statements to the DCS workers were "irrelevant to any issue in this case and had no tendency to show [his] motive, intent, or lack of mistake with respect to the photographs," and their "only purpose" was to make him look like a bad person. He further argues the evidence was "substantially more prejudicial than probative," because it "did little to shed light on any issue," and painted him as a "rude person who makes unwanted advances on women." The state counters that the evidence was relevant to its theory that Nowak desired "people know that, despite his MS, his penis still functioned normally," rebutting Nowak's theory that the photographs had been taken without his knowledge. It further argues "[e]ven if the evidence had the risk of making Nowak look like a rude person, that danger did not substantially outweigh the probative value."

¶31 Generally, "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." Ariz. R. Evid. 404(b). However, this evidence may

properly be admitted for another purpose, such as to show motive, intent, knowledge, or absence of mistake or accident. *Id.* Before admitting other-act evidence, the trial court must find: (1) there is clear and convincing evidence that the act occurred and the defendant committed it; (2) the act is offered for a proper purpose; (3) the act is relevant to prove that purpose; and (4) "any probative value is not substantially outweighed by unfair prejudice." *State v. Anthony*, 218 Ariz. 439, ¶ 33 (2008). Upon request, the court must also provide a limiting instruction. *Id.* Here, the court properly engaged in the Rule 404(b) analysis, provided a limiting instruction, and did not abuse its discretion in admitting the evidence.

¶32 Nowak asserts that the statements to the DCS workers were irrelevant and had no proper purpose. However, relevance is a low threshold, *see State v. Tucker*, 215 Ariz. 298, ¶ 51 (2007), and "a defendant who claims he lacked the necessary mental state may open the door to evidence of similar past wrongdoing," *State v. Scott*, 243 Ariz. 183, ¶ 15 (App. 2017).

¶33 At the hearing, Nowak asserted that his defense at trial would be that H.N. had taken the pictures while he was "unconscious or completely unaware." The DCS workers' testimony showed Nowak repeatedly wanted others to know that he did not suffer from sexual dysfunction, which provided motive as to why he would have asked his daughter to take pictures of his penis and share them with her friends, and tended to show knowledge, lack of mistake or accident, and rebutted a theory to the contrary—it was therefore proper. *See* Ariz. R. Evid. 401 (evidence relevant if it "has any tendency to make a fact more or less probable" and "the fact is of consequence in determining the action"). And although the prior acts are not identical to the charge at issue, they need not be to be relevant to a proper purpose. *See State v. Gulbrandson*, 184 Ariz. 46, 61 (1995) (other act must only be similar if similarity is the basis for relevance); *State v. Woody*, 173 Ariz. 561, 563 (App. 1992) (other act must only be sufficiently similar to infer purpose for which offered).

¶34 Nowak next argues that any probative value of the evidence was substantially outweighed by a risk of prejudice. "Trial courts have broad discretion in balancing probative value against prejudice, and we will not reverse unless error is clear." *State v. Salazar*, 181 Ariz. 87, 91 (App. 1994). Nowak has not persuaded us that the court clearly erred.

¶35 "Unfair prejudice means an undue tendency to suggest decision on an improper basis . . . such as emotion, sympathy or horror." *Riley*, 248 Ariz. 154, ¶ 70 (quoting *State v. Schurz*, 176 Ariz. 46, 52 (1993)).

"[N]ot all harmful evidence is unfairly prejudicial" because all relevant evidence is adversely probative. *Schurz*, 176 Ariz. at 52. Here, the testimony by the DCS workers was minimal in scope and not "highly evocative"; although it showed Nowak made undesirable statements, they do not rise to the level of suggesting that a decision would be made on an improper basis amounting to unfair prejudice. *Compare State v. Hardy*, 230 Ariz. 281, ¶¶ 41-42 (2012) (no abuse of discretion admitting evidence that defendant asked his son to keep a gun because the evidence not "highly evocative") *with Salazar*, 181 Ariz. at 92 (abuse of discretion to admit "inflammatory detail" of violent nature of prior rape that occurred eighteen years before charged offense). Once Nowak attempted to show that the photographs had been taken without his knowledge, the trial court was within its discretion to determine the evidence had enough probative value to withstand the balancing test. *See Schurz*, 176 Ariz. at 52.

¶36 Further, the trial court limited the testimony offered by the state by precluding testimony that Nowak had come into the room of a woman who was staying in his home, and stated "I have something for you—I think you're going to like it," and asked her to "touch [his penis]." *Cf. Payne*, 233 Ariz. 484, ¶ 58 ("When other act evidence is admissible but prejudicial, the trial court must 'limit the evidence to its probative essence . . . by excluding irrelevant or inflammatory detail.'" (quoting *State v. Hughes*, 189 Ariz. 62, 70 (1997))). And the court provided the following instruction to the jury, clearly limiting their use of other-act evidence:

> Evidence of other acts has been presented. You may consider these acts only if you find that the State has proved by clear and convincing evidence that the defendant committed these acts. You may only consider these acts to establish the defendant's motive, intent, absence of mistake or absence of accident. You must not consider these acts to determine the defendant's character or character trait or to determine that the defendant acted in conformity with the defendant's character or trait and therefore committed the charged offense.

We presume jurors follow the court's instructions, *Newell*, 212 Ariz. 389, ¶ 68, and the state emphasized this instruction in its closing argument, calling attention to the limited nature for which this evidence could be

considered. Accordingly, any possible unfair prejudice to Nowak as a result of this evidence was diminished, and the court did not abuse its discretion. *See State v. Villalobos*, 225 Ariz. 74, ¶ 20 (2010) (jury instruction mitigated prejudice from Rule 404(b) evidence); *Hardy*, 230 Ariz. 281, ¶ 40 (court did not abuse discretion where it "could reasonably find" evidence more probative than prejudicial due to significance of purpose for which it was offered and where limiting instruction provided).

¶37 We do agree with Nowak, however, that one of the DCS worker's statements, that Nowak "liked the way [she] felt," was irrelevant to any proper purpose and should have been precluded. Because Nowak objected to this statement, we review for harmless error. *See State v. Henderson*, 210 Ariz. 561, ¶ 18 (2005) (harmless error review for objected to error). This minor statement was made in the context of three days of testimony, in which the jury was properly instructed on other-act evidence. On this record, we are convinced beyond a reasonable doubt that the guilty verdicts were surely unattributable to the error, and its admission was harmless. *See State v. Romero*, 240 Ariz. 503, ¶¶ 7, 9, 14, 19, 21 (App. 2016) (in considering whether error was harmless, we may consider whether the evidence was "primary evidence," the prejudicial effect, and jury instructions provided).[8]

Disposition

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

[8]At trial, this witness testified that Nowak said he "liked the way [she] felt, liked the way [she] smelled." On appeal, Nowak also takes issue with the latter part of this statement. Because this testimony was not elicited at the pretrial hearing, Nowak's challenge to the trial court's pretrial ruling apparently does not implicate this statement, but in any event, assuming this issue was preserved, our analysis as to error and harmless error is the same.