

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

RICHARD ALAN NOVAK,
Appellant.

No. 2 CA-CR 2021-0058
Filed April 14, 2022

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pinal County
No. S1100CR202000625
The Honorable Delia R. Neal, Judge

AFFIRMED

COUNSEL

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

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MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Eckerstrom and Chief Judge Vásquez concurred.

ESPINOSA, Judge:

¶1 Richard Novak appeals from his convictions and sentences for six counts of sexual exploitation of a minor. Novak contends the trial court reversibly erred by admitting evidence of additional images of child pornography for which he was not charged and by admitting that evidence without making specific findings on the record as required by Rule 404(c)(1)(D), Ariz. R. Evid. For the following reasons, we affirm Novak’s convictions and sentences.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against Novak. *See State v. Felix*, 237 Ariz. 280, ¶ 2 (App. 2015). In March 2020, Novak was indicted for ten counts of sexual exploitation of a minor.¹ Each count arose from a separate image of child pornography from the “Siberian” series that police found on an electronic data storage card (“SD card”) when they executed a search warrant for his apartment. Numerous other exploitive images of children were also found during the search. Following a jury trial, Novak was found guilty as noted above, and the trial court sentenced him to consecutive, presumptive prison terms totaling 102 years. We have jurisdiction over this appeal pursuant to A.R.S. §§ 13-4031 and 13-4033(A).

Admission of Other-Act Evidence

¶3 Before trial, the state filed a motion in limine to admit other-act evidence pursuant to Rule 404(c). Novak opposed the motion and the trial court conducted a hearing. The court ultimately granted the state’s request, ruling that it could elicit testimony about the uncharged images of child pornography.

¹ Although Novak was originally indicted on ten counts, counts seven through ten were subsequently dismissed on the state’s motion.

STATE v. NOVAK
Decision of the Court

¶4 We review the trial court’s admission of evidence for an abuse of discretion. *State v. Herrera*, 232 Ariz. 536, ¶ 19 (App. 2013). A court abuses its discretion when its reasoning is clearly untenable, is legally incorrect, or amounts to a denial of justice. *State v. Arellano*, 213 Ariz. 474, ¶ 14 (2006). “The proponent of other-act evidence carries the burden of proving its admissibility in all respects.” *State v. James*, 242 Ariz. 126, ¶ 25 (App. 2017). We may affirm a trial court’s Rule 404(c) evidentiary ruling on any basis supported by the record. *Id.* ¶ 28.

¶5 Novak’s primary contention is, as he argued below, that the other-act testimony was unduly prejudicial because child pornography “understandably provoke[s] feelings of outrage and anger” and the “inflammatory and prejudicial” testimony about the uncharged images caused “the jury to make decisions based upon emotion rather than dispassionate weighing of evidence.” He argues the balancing required under Rule 403, Ariz. R. Evid., was an “empty promise” because the state was allowed to present “excessively prejudicial, unduly confusing and highly inflammatory” evidence.

¶6 To be admissible under Rule 404(c), the “evidentiary value” of the other-act evidence cannot be “substantially outweighed by danger of unfair prejudice, confusion of issues, or other [Rule 403] factors.” Ariz. R. Evid. 404(c)(1)(C). When making its determination, the trial court must consider several factors, including: the remoteness of the other act, its similarity or dissimilarity to the charged offense, the strength of the evidence that the defendant committed the other act, and the frequency of such acts. Ariz. R. Evid. 404(c)(1)(C). Unfair prejudice results when evidence has an undue tendency to suggest a decision on an improper basis, such as emotion, sympathy, or horror. *State v. Hardy*, 230 Ariz. 281, ¶ 40 (2012). However, not all harmful evidence is unfairly prejudicial; relevant and material evidence will generally be adverse to the defendant. *State v. Schurz*, 176 Ariz. 46, 52 (1993). “[W]hile evidence that makes a defendant look bad may be prejudicial in the eyes of jurors, it is not necessarily unfairly so.” *State v. Guarino*, 238 Ariz. 437, ¶ 9 (2015). Because the trial court is in the best position to balance the probative value of proffered other-act evidence against the potential for unfair prejudice, it is afforded broad discretion to make its determination. *See State v. Togar*, 248 Ariz. 567, ¶ 23 (App. 2020); *see also State v. Smith*, 250 Ariz. 69, ¶ 76 (2020), *cert. denied*, ___ U.S. ___, 141 S. Ct. 2472 (2021).

¶7 At trial, the state elicited the following evidence pertaining to the uncharged images of child pornography that Novak generally

STATE v. NOVAK
Decision of the Court

challenges:² police had received a Google report issued to the National Center for Missing and Exploited Children that flagged a series of photos labeled “Siberian”; Novak’s laptop had “a lot of JPEG[]” images from the Siberian series; Novak’s SD card contained photos of “nude boys at a beach” in the allocated space, and “well over a hundred” images of child pornography in the unallocated space;³ and there were images from the Siberian series on two “jump drive” storage devices found in Novak’s apartment.

¶8 While that evidence was adverse to Novak’s defense, it was not unfairly prejudicial. *See State v. Scott*, 243 Ariz. 183, ¶ 17 (App. 2017) (evidence of prior sexual assault not unduly prejudicial when charged offense and other act were nearly identical). Significantly, Novak’s conclusory argument fails to cite any authority suggesting that such limited and contemporaneously discovered evidence was unduly prejudicial in a prosecution for sexual exploitation of a minor. Moreover, the jury never saw the uncharged images, nor were they described in detail; witnesses simply testified to the fact that additional images of child pornography were found on Novak’s electronic devices. Novak has not meaningfully explained how this testimony was unfairly prejudicial, especially in light of the fact that the jury was necessarily shown the six images for which he was charged, as well as a videotaped interview where Novak made numerous incriminating statements regarding both the charged and uncharged images.

¶9 Furthermore, we cannot say the trial court abused its discretion because the relevant factors listed in Rule 404(c)(1)(C) weighed in favor of admitting the evidence. The other acts were not remote in time, they were similar or identical to the offenses for which he was charged, the evidence indicated Novak had committed the other acts, and those acts appeared to have occurred continuously over a period of time. *See Ariz. R. Evid. 404(c)(1)(C)(i)-(iv)*. Additionally, Novak only superficially addresses the Rule 404(c)(1)(C) factors and, as noted, does not identify any particular portions of the testimony that were unfairly prejudicial.

²Novak has not specified which testimony should not have been admitted.

³“Unallocated space” refers to storage areas on an electronic device from which deleted files can sometimes be recovered with specialized software unless they have been overwritten.

STATE v. NOVAK
Decision of the Court

¶10 Finally, the trial court mitigated any unfair prejudice resulting from the limited other-act testimony by properly instructing the jury. See *State v. Payne*, 233 Ariz. 484, ¶ 151 (2013) (absent evidence to the contrary, we presume jury follows instructions); *State v. Coghill*, 216 Ariz. 578, ¶ 19 (App. 2007) (risk of unfair prejudice minimized when other-act evidence is narrowed or limited while preserving its probative value). The instructions here accurately summarized Rule 404(c)'s requirements and described the limited manner in which the jury could consider the other-act evidence. And, Novak has not challenged the suitability of the court's instructions on appeal.

¶11 Novak also suggests the trial court abused its discretion because there was insufficient evidence that the uncharged images of child pornography belonged to him. Novak argues he "shared his apartment with his son . . . and had had other roommates previously . . . who had access to his computers." Thus, he asserts the court erred by allowing testimony "about hundreds of images of child pornography," which allowed the jury to "infer all were downloaded or otherwise possessed by" Novak.

¶12 Under Rule 404(c), for other-act evidence to be admissible, there must be clear and convincing evidence the defendant committed the other act. Ariz. R. Evid. 404(c)(1)(A); *James*, 242 Ariz. 126, ¶ 17. Here, there was substantial evidence showing that the other images of child pornography belonged to Novak. He admitted that he recognized the child pornography saved to his Google Drive account, his Google password and his laptop password were both "Hellbound1," personal photos belonging to Novak were found among the images of child pornography, and child pornography was stored on at least four electronic devices identified as belonging to Novak. Further, police found a deleted email from Novak to his son that included a hyperlink with the word "preteen," and when they entered Novak's apartment to serve the warrant, he was nude in the same room as a laptop displaying an image of a naked child on its screen. While Novak claimed his computer was not always password protected and that other people used his electronic devices, there was ample evidence supporting the trial court's ruling with respect to the requirements of Rule 404(c)(1)(A).

Specific Findings on the Record

¶13 Novak also contends his convictions and sentences must be vacated because the trial court failed to make specific findings on the record when admitting the other-act evidence as required by Rule 404(c)(1)(D).

STATE v. NOVAK
Decision of the Court

The state concedes that the court erred but argues we should affirm because the error was harmless and Novak has therefore not shown fundamental error.

¶14 Because Novak failed to preserve this issue below by bringing it to the trial court's attention, we review for fundamental error. *See State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008) (objection on one ground does not preserve issue on another ground); *State v. Williams*, 220 Ariz. 331, ¶¶ 6-8 (App. 2008) (reviewing for fundamental error when defendant failed to object to trial court's lack of specific findings at sentencing); *James*, 242 Ariz. 126, ¶ 26 (defendant has duty to object to "any procedural irregularities he wishes to later raise on appeal"); *cf. State v. Vega*, 228 Ariz. 24, ¶ 8 (App. 2011) (reviewing lack of 404(c) findings for abuse of discretion when defendant "expressly and unambiguously objected" to trial court's failure to consider 404(c) admissibility factors).

¶15 Novak has not adequately developed the argument that the trial court's lack of findings constituted fundamental error. *See Ariz. R. Civ. App. P. 13(a)(7)* (brief must contain arguments that cite legal authority and record to support contentions). Indeed, his brief does not mention fundamental error, nor does it provide the applicable legal standard, or elaborate as to how the absence of specific findings prejudiced his defense. *See State v. Vargas*, 249 Ariz. 186, ¶ 13 (2020) (no obligation to consider general claim of error not adequately developed by appellant). As such, Novak has waived this argument because he has not articulated how the error was fundamental or prejudicial. *See id.* ¶ 12 (to establish fundamental error defendant has burden to show prejudice). And while we will not ignore fundamental error if we see it, *see State v. Fernandez*, 216 Ariz. 545, ¶ 32 (App. 2007), the court's lack of specific findings in this instance was not fundamental error because, for the reasons stated above, it did not err in admitting the other-act evidence, *see Vega*, 228 Ariz. 24, ¶¶ 13-25 (admission of Rule 404(c) other-act evidence harmless despite trial court's failure to properly consider factors and make specific findings); *State v. Marshall*, 197 Ariz. 496, ¶ 7 (App. 2000) (failure to make specific findings as required by 404(c) "was at most harmless error").

Disposition

¶16 For the foregoing reasons, Novak's convictions and sentences are affirmed.