FILED BY CLERK
APR -9 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JUAN CARLOS MENDEZ-BAUTISTA, Appellant.	2 CA-CR 2008-0145 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20073757

Honorable Stephen C. Villarreal, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Jonathan Bass
Tucson
Attorneys for Appellee

Robert J. Hirsh, Pima County Public Defender
By Michael J. Miller
Tucson
Attorneys for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, Juan Mendez-Bautista was convicted of possession of marijuana for sale and possession of drug paraphernalia. The trial court sentenced him to concurrent, mitigated prison terms, the longer of which was four years. He argues the court erred when it admitted evidence he had attempted twice before to enter the United States illegally and when it failed to take judicial notice of the fact the Mexican government does not protect its citizens from drug-related violence. For the following reasons, we affirm.

¶2 "We view the evidence in the light most favorable to sustaining the convictions." *State v. Sarullo*, 219 Ariz. 431, ¶ 2, 199 P.3d 686, 688 (App. 2008). On September 22, 2007, a United States Border Patrol agent was patrolling in a rural area of Pima County near a two-lane highway. A pedestrian sensor registered a "hit" in a desert area about thirteen miles north of the United States' border with Mexico. The agent hiked approximately three-quarters of a mile from the road and hid to wait for the people who had triggered the sensor.

¶3 From a hundred feet away, he saw eight to ten individuals walking single file, carrying big bundles on their backs. After two of those people had passed by his hiding place, the agent emerged and identified himself as an agent of the United States Border Patrol. At that point, as others in the group scattered, the agent grabbed Mendez-Bautista, put handcuffs on him, and "threw him on the ground." Mendez-Bautista was carrying a rudimentary backpack consisting of a bundle of marijuana with blankets for straps and a small nylon cord tied between them, forming a "little, tiny strap across the front." That

backpack, and the other backpacks abandoned by others who fled, together contained approximately 275 pounds of marijuana. During the forty-five-minute wait for the sheriff's deputies to arrive, Mendez-Bautista told the agent he had been heading to Phoenix to see his girlfriend. He did not claim he had been forced to carry the marijuana.

¶4 At trial, Mendez-Bautista testified his girlfriend[1] and daughter are United States citizens and he had attempted to enter the United States illegally in order to be with them and provide them with a better life. After two unsuccessful attempts on September 2 and September 10, 2007, Mendez-Bautista testified he had decided he would no longer try to enter. According to Mendez-Bautista, when he tried to tell the coyote he did not want to cross again, the coyote's men kidnapped him for two days, then forced him to put on the backpack of bundled marijuana. He claimed they tied a rope to the backpack and around his chest and pushed him over the border. He testified that, if he had not done what the coyote told him to do, he would have been killed. He also testified he did not tell the agent he had been forced to cross the border with the marijuana because he was trying to protect himself from the coyote's retaliation.

[1]During his testimony, Mendez-Bautista consistently referred to this person as his wife but apparently told one of the border patrol agents she was his girlfriend. When asked their relationship at trial, Mendez-Bautista testified they lived together. Because the record is unclear, we refer to her as his girlfriend.

OTHER-ACT EVIDENCE

¶5 Mendez-Bautista argues the trial court erred when it admitted evidence he had twice previously attempted to enter the country illegally. Specifically, he contends the evidence was not relevant nor admitted for a proper purpose under Rule 404(b), Ariz. R. Evid., and the danger of unfair prejudice from the evidence outweighed its probative value under Rule 403, Ariz. R. Evid. We review a trial court's ruling admitting evidence under Rule 404(b) for an abuse of discretion. *State v. Coghill*, 216 Ariz. 578, ¶ 13, 169 P.3d 942, 946 (App. 2007). And we may affirm the trial court's ruling if legally correct for any reason. *See State v. Andriano*, 215 Ariz. 497, ¶ 23, 161 P.3d 540, 546 (2007).

¶6 The court granted the state's motion under Rule 404(b) to allow the testimony of the border patrol agents who had interviewed Mendez-Bautista after his two prior attempts to enter the United States illegally. In admitting the evidence, the court simply stated that it was "relevant evidence, relevant information" and that "the probative value of the prior acts outweighs the prejudicial effect."

¶7 Rule 404(b) allows the admission of evidence of "other crimes, wrongs, or acts" to prove "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident," but not as improper character evidence.

> Four provisions of the [Arizona R]ules of [E]vidence govern admission of prior bad act evidence: Rule 404(b) requires that the evidence be admitted for a proper purpose, Rule 402 requires that the evidence be relevant, Rule 403 requires that the danger of unfair prejudice not outweigh probative value,

> and Rule 105 requires that the judge give an appropriate limiting instruction upon request.

State v. Nordstrom, 200 Ariz. 229, ¶ 54, 25 P.3d 717, 736 (2001).

¶8 Mendez-Bautista argues the evidence was not admitted for any proper purpose under Rule 404(b). The state counters, *inter alia*, that the "evidence of prior crossings was admissible to prove [Mendez-Bautista]'s motive, intent and plan." To establish that other-act evidence is admissible as part of a common scheme or plan, its proponent must "establish 'a particular plan of which the charged crime is a part.'" *State v. Hughes*, 189 Ariz. 62, 69, 938 P.2d 457, 464 (1997), *quoting State v. Ives*, 187 Ariz. 102, 106-07, 927 P.2d 762, 766-67 (1996).[2] Mere similarity between the charged crime and the other acts is insufficient to establish that the other acts were part of a common scheme or plan. *Id.* "'The distinction is between proving a specific plan embracing the charged crime and proving a general commitment to criminality which might well have involved the charged crime.'" *State v. Ramirez Enriquez*, 153 Ariz. 431, 433, 737 P.2d 407, 409 (App. 1987), *quoting* Morris K. Udall et al., *Arizona Practice: Law of Evidence* § 84, at 184 n.17 (2d ed. 1982).

¶9 The state emphasized below that Mendez-Bautista "engaged in a plan to get across the border in any way possible by agreeing to seize the opportunity to transport marijuana" and that the evidence of his two prior attempts showed his "desperation to enter

---

[2]Although *Ives* is a case involving the joinder of offenses under Rule 13.3(a)(3), Ariz. R. Crim. P., the court held its definition of common scheme or plan applicable to other-act evidence under Rule 404(b). *Ives*, 187 Ariz. at 108-09, 927 P.2d at 768-69.

into the United States." Indeed, the three agents' testimony about Mendez-Bautista's purpose for entering this country was consistent with his own testimony that he had been attempting to enter to see his girlfriend and daughter and to provide a better life for them by finding work in the United States. Thus, the testimony of both Mendez-Bautista and the agents supports the conclusion that Mendez-Bautista's final attempt at entry was in fact part of his "'over-arching criminal plan'" to get into the United States by any means necessary. *Lee*, 189 Ariz. at 598, 944 P.2d at 1212, *quoting Ives*, 187 Ariz. at 109, 927 P.2d at 769.

¶10 Moreover, that the attempts and the charged crime happened at the same general location and within a three-week period also tended to show they were part of a common scheme or plan. *See Ives*, 187 Ariz. at 108, 927 P.2d at 768 (closeness in time relevant factor in common-scheme-or-plan joinder determination); *cf. State v. Valdez*, 23 Ariz. App. 518, 521, 534 P.2d 449, 452 (1975) (for prior acts involving sex offenses, remoteness in time precludes admissibility). Because the foregoing factors support admission of the testimony about the other acts to show Mendez-Bautista's plan to enter the United States illegally and because a jury could infer the charged crime was part of that plan, the trial court did not abuse its discretion by admitting the evidence under Rule 404(b).

¶11 Mendez-Bautista argues that, even if the evidence was relevant and admitted for a proper purpose, its prejudicial impact outweighed its probative value. But the trial court conducted the weighing required by Rule 403 and specifically found otherwise. *See State v. Vigil*, 195 Ariz. 189, ¶ 27, 986 P.2d 222, 226 (App. 1999) (finding error when court failed

to conduct any Rule 403 inquiry as to prior-act evidence). Nothing in the record suggests the court abused its discretion in doing so. Indeed, the record suggests Mendez-Bautista's defense was not meaningfully prejudiced by the evidence of his other unsuccessful efforts to enter the country. As noted, the agents' testimony regarding his prior arrests was cumulative to evidence presented by Mendez-Bautista himself that he had previously tried to enter the country and that for him to do so would be illegal. And, given that Mendez-Bautista was not charged with transporting marijuana either of the other two times, those events actually supported his defense theory that he did not willingly transport marijuana in this instance. Finally, the court provided a limiting instruction to mitigate any risk that the jury might consider the evidence for improper purposes,[3] and we presume the jury followed that instruction. *See State v. McCurdy*, 216 Ariz. 567, ¶ 17, 169 P.3d 931, 938 (App. 2007); *see also State v. Van Adams*, 194 Ariz. 408, ¶ 26, 984 P.2d 16, 25 (1999) (considering whether jury followed limiting instruction on other-act evidence and concluding "[n]othing

[3]The instruction was read to the jury as follows:

> Evidence of other acts has been presented. You may consider these acts only if you find 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, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or 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 character trait and therefore committed the charged offense.

in the record indicates that the jury failed to comply with this admonition"). We thus find no abuse of the court's discretion in admitting the evidence that Mendez-Bautista had twice before attempted to enter the United States illegally.

JUDICIAL NOTICE

¶12 Mendez-Bautista also argues the trial court erred when it refused to take judicial notice of the failure of the Mexican government to protect its citizens from the effects of drug-related violent crime. We review a trial court's evidentiary rulings for an abuse of discretion. *State v. Armstrong*, 218 Ariz. 451, ¶ 20, 189 P.3d 378, 385 (2008).

¶13 To explain why he had not reported his abduction to police in Mexico, Mendez-Bautista moved the court to take judicial notice that the Mexican government cannot protect its citizens "from the adverse [e]ffects of widespread narco-violence in Mexico." After holding a hearing on the issue, the court declined to take notice of the newspaper articles Mendez-Bautista had submitted in support of his motion.

¶14 Rule 201(b), Ariz. R. Evid., provides: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." *See Phelps Dodge Corp. v. Ford*, 68 Ariz. 190, 196, 203 P.2d 633, 638 (1949) ("A high degree of probability of the truth of a particular proposition cannot justify a tribunal in taking judicial notice of its truth. A fact of which a court may take judicial notice must be indisputable.") (citation omitted); *Cooley*

v. Ariz. Pub. Serv. Co., 173 Ariz. 2, 6, 839 P.2d 422, 426 (App. 1991) (McGregor, J., concurring in part and dissenting in part) (concept of judicial notice used sparingly, and most often with scientific or geographic facts).

¶15 Mendez-Bautista concedes the absence of any Arizona precedent for taking judicial notice of a fact from a newspaper article or series of articles. Instead, he relies on two federal circuit court cases in which each court took judicial notice of newspaper articles. *See Ritter v. Hughes Aircraft Co.*, 58 F.3d 454 (9th Cir. 1995); *Washington Post v. Robinson*, 935 F.2d 282 (D.C. Cir. 1991). But in *Robinson*, the court merely took judicial notice of newspaper articles surrounding the criminal investigation of the mayor to show a key witness had agreed to cooperate with the government. 935 F.2d at 283, 291-92. And in *Ritter*, the appellate court found the trial court had not abused its discretion in taking judicial notice of the fact there had been widespread layoffs at the defendant's company, which had been reported in the newspaper. 58 F.3d at 458-59. Both *Robinson* and *Ritter* involved the courts' taking notice of facts "capable of accurate and ready determination," Ariz. R. Evid. 201(b), whereas here, Mendez-Bautista asked the court to take notice of an assertion that is subject to dispute: that the Mexican government does not protect its citizens from drug-related violence.[4]

[4]In so concluding, this court offers no opinion on the factual accuracy of the articles presented. But, we note that the act of taking judicial notice deprives an opposing party of any opportunity to contest any fact found thereby and is therefore an inappropriate evidentiary mechanism when the "fact" to be so noticed is disputable in any respect.

¶16 Thus, we conclude the articles here did not contain the type of fact of which judicial notice is properly taken. *Cf. Vigue v. Noyes*, 113 Ariz. 237, 240, 550 P.2d 234, 237 (1976) (court would not take judicial notice of horses' propensity to fight with and bite each other); *Shafer v. Monte Mansfield Motors*, 91 Ariz. 331, 334, 372 P.2d 333, 335 (1962) (higher frequency of accidents when cars driven by joyriders or thieves not type of fact court may properly judicially notice); *In re Cesar R.*, 197 Ariz. 437, ¶ 7, 4 P.3d 980, 982-83 (App. 1999) (refusing to take judicial notice of fact Pima and Maricopa Counties have more juvenile gun-related crime).

¶17 Mendez-Bautista's convictions and sentences are affirmed.

_____
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

_____
J. WILLIAM BRAMMER, JR., Judge

_____
GARYE L. VÁSQUEZ, Judge