FILED BY CLERK
AUG 28 2009
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. BRETT ALLEN BELL, Appellant.	)	2 CA-CR 2008-0246 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause Nos. CR20070577 and CR20080285 (Consolidated)

Honorable Peter J. Cahill, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
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Phoenix
Attorneys for Appellee

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Tucson
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H O W A R D, Chief Judge.

¶1 After a jury trial, Brett Bell was convicted of two counts of attempted first-degree murder, four counts of aggravated assault, one count of first-degree burglary, and two counts of interfering with judicial proceedings. The trial court sentenced Bell to a combination of concurrent and consecutive prison terms totaling twenty-eight years. Bell raises numerous issues on appeal. Finding no reversible error or abuse of discretion, we affirm Bell's convictions and sentences.[1]

Facts

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Bell and victim T. had been in a relationship that ended approximately two months before the crimes in this case were committed. Due to Bell's harassing and threatening behavior after the relationship ended, T. and her new boyfriend K. obtained orders of protection against Bell. About one month later, Bell hid in T.'s house and waited for T. and K. to return. When they entered the home, Bell attacked them both with a club, repeatedly striking them, and threatened them with a gun. K. eventually escaped and ran to a neighbor's house for help. Meanwhile, Bell apparently left T.'s house as well and T. called 911. Both K. and T. identified Bell as their attacker. As a result of the attack, T. suffered four head injuries and underwent treatment

[1]As to one issue, Bell asserts in a list of "Issues Presented" that the trial court "erred in giving the *Portillo* instruction." *See State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995). But he does not provide any argument in his opening brief on this claim and it is therefore waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

including "a blood transfusion, staples, stitches, [and] CAT scans." T.'s arm also was bruised and one of her eyes was swollen shut for three days. K. required staples to treat injuries to his head and shin and he suffered bruising and swelling from a blow to his hand.

¶3 A jury found Bell guilty of identical charges as to each victim; that is, attempted first-degree murder, aggravated assault by using the club, aggravated assault by threatening with the gun, and interfering with judicial proceedings for violating the orders of protection. The jury also found Bell guilty of one count of first-degree burglary. The trial court imposed concurrent sentences for all felony offenses except the burglary, for which the court imposed the sentence consecutive to the others. As to the two counts of interfering with judicial proceedings, the trial court sentenced Bell to 180 days and gave him credit for time served on these counts.

Preclusion of Evidence of Victim's Drug Dealing and Third-Party Culpability Defense

¶4 Bell first argues the trial court erroneously precluded him from introducing evidence that victim T. was involved in drug dealing. Bell contends that because of this error, he was denied the opportunity to present a third-party culpability defense, namely, that unknown drug dealers had perpetrated the attack. We review the trial court's decision to exclude evidence of third-party culpability for an abuse of discretion. *State v. Prion*, 203 Ariz. 157, ¶ 21, 52 P.3d 189, 193 (2002).

¶5 "While a defendant may attempt to show that another person is guilty of the crime with which he is charged, the trial court is not obligated to allow the defendant to offer

mere suspicion or speculation regarding a class of persons." *State v. Dann*, 205 Ariz. 557, ¶ 36, 74 P.3d 231, 243 (2003). Here, Bell sought to admit evidence that T. was selling marijuana but he offered no evidence to connect this activity to the attacks on T. and K., other than to speculate that the drug trade in general is violent. The trial court was well within its discretion to conclude the evidence of T.'s drug dealing either did not create a reasonable doubt as to Bell's guilt and was therefore not relevant, or that even if the evidence was relevant, it was "so tenuously and speculatively connected to the case that it would have caused undue confusion of the issues or misled the jury." *Id.* ¶ 35. Accordingly, the trial court did not abuse its discretion in precluding this evidence.

Other Act Evidence

¶6 Bell next argues the court erred in permitting the state to present evidence that he had harassed T. and K. before the day of the attack. Bell asserts the introduction of the evidence violated "disclosure" and Rules 401 and 404(b), Ariz. R. Evid.

¶7 In his opening brief on appeal, Bell describes the evidence presented, recounts the arguments of the parties below, and recites the court's reasoning in admitting the evidence. Bell then provides two paragraphs of argument as to why the court erred in admitting the evidence. In this argument, Bell cites an inapplicable case involving the admission of sexual propensity evidence under what is now Rule 404(c), Ariz. R. Evid., claiming a lack of similarity between the other act evidence and the crimes charged militates against admission. Because Bell's argument is neither supported by applicable authority nor

adequately developed, it is waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995).

¶8 Bell further asserts the other acts show only jealousy and that this is a character trait not allowed under Rule 404(b). This argument is undeveloped and unsupported by authority and is therefore also waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also Bolton*, 182 Ariz. at 298, 896 P.2d at 838. Additionally he asserts the prejudicial nature of the evidence outweighed the probative value because the other acts were "so removed" from the actual crimes. But, based on Bell's minimal argument, we conclude the trial court did not abuse its discretion in balancing the prejudice and probative value. *State v. Cañez*, 202 Ariz. 133, ¶ 61, 42 P.3d 564, 584 (2002) (trial court best situated to balance probative value and prejudice).

Consolidation with Other Charges

¶9 Bell next contends the court erred in consolidating the charges for interfering with judicial process with his other charges. We review the trial court's decision to join charges for an abuse of discretion. *State v. Prince*, 204 Ariz. 156, ¶ 13, 61 P.3d 450, 453 (2003). We consider the trial court's decision "'based on the showing at the time the motion is made.'" *State v. Gretzler*, 126 Ariz. 60, 73, 612 P.2d 1023, 1036 (1980), *quoting State v. Dale*, 113 Ariz. 212, 215, 550 P.2d 83, 86 (1976). Rule 13.3(a), Ariz. R. Crim. P., provides that offenses may be joined in an indictment "if they: (1) [a]re of the same or similar

character; or (2) [a]re based on the same conduct or are otherwise connected together in their commission; or (3) [a]re alleged to have been a part of a common scheme or plan."

¶10 As noted previously, the interfering with judicial process charges in this case arose from Bell's violation of the orders of protection. The evidence of the violations of the orders is the same evidence that supports the other charges of attempted first-degree murder, aggravated assault, and burglary; that is, that Bell hid inside K.'s home and attacked K. and T. when they went inside.

¶11 Bell asserts the trial court joined the charges only under Rule 13.3(a)(1), offenses of the "same or similar character." He argues this was improper for various reasons. But the trial court clearly indicated that it considered the offenses to be based on the same conduct under Rule 13.3(a)(2). Bell does not challenge joinder under subsection (a)(2), and has therefore waived any such argument on appeal. *See State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989) (arguments not made on appeal abandoned and waived).

¶12 In any event, the trial court was well within its discretion to join these charges as offenses based on the same conduct under Rule 13.3(a)(2). *Cf. Prince*, 204 Ariz. 156, ¶ 15, 61 P.3d at 453 (joinder proper under Rule 13.3(a)(2) when "two crimes occurred within seconds of each other and arose out of the same domestic dispute"). And because the trial court properly instructed the jury to "decide each count separately . . . uninfluenced by [its] decisions on any other count," Bell was not prejudiced by joinder of these offenses. *See id.* ¶ 17.

Admission of Photographs

¶13 Bell next argues the trial court erred in admitting "gruesome" photographs of T.'s injuries. We review the trial court's decision for an abuse of discretion. *State v. Dann*, 220 Ariz. 351, ¶ 44, 207 P.3d 604, 615 (2009). To determine admissibility of an allegedly gruesome photograph, the court considers the relevance of the photograph, its inflammatory nature, and whether its probative value is outweighed by the potential for prejudice. *See State v. Cruz*, 218 Ariz. 149, ¶ 125, 181 P.3d 196, 215-16 (2008), *cert. denied*, ___ U.S. ___, 129 S. Ct. 900 (2009). Relevant photographs that are gruesome or inflammatory may still be admissible unless they are "'admitted for the sole purpose of inflaming the jury.'" *State v. Morris*, 215 Ariz. 324, ¶ 70, 160 P.3d 203, 218 (2007), *quoting State v. Gerlaugh*, 134 Ariz. 164, 169, 654 P.2d 800, 805 (1982). A photograph's probative value may be minimal when it establishes a fact that is not contested by the defendant. *State v. Bocharski*, 200 Ariz. 50, ¶ 23, 22 P.3d 43, 49 (2001).

¶14 Over Bell's objection, the trial court admitted photographs depicting the injuries to T.'s head. The photographs show blood in T.'s hair and on her face and a sutured laceration on her scalp. Bell argues the photographs "went to largely uncontested issues" because Bell did not "challenge the fact of the victim's assault or the extent of the injuries." But the state had the burden to prove Bell attempted to kill T., not just that he assaulted her. Although Bell's primary defense was that he was not the attacker, he did not stipulate that the attacker had in fact attempted to murder the victims. And in his closing argument, Bell

specifically challenged the extent of the injuries with respect to whether the evidence established an intent to kill. The trial court expressly considered the probative value of the photographs in showing an intent to kill and found this value was not outweighed by the danger of prejudice. The court did not abuse its discretion in admitting the photographs. *See Morris*, 215 Ariz. 324, ¶ 71, 160 P.3d at 218-19.

Denial of Motion for Mistrial

¶15 Bell next contends the trial court erred in denying his motion for mistrial on the ground that T. gave prejudicial testimony despite admonishments from the court. We review a court's decision to deny a request for mistrial for an abuse of discretion. *State v. Stuard*, 176 Ariz. 589, 601, 863 P.2d 881, 893 (1993). In determining whether to grant a mistrial, the trial court considers whether a witness's improper testimony called the jury's attention to matters it should not consider and whether, under the circumstances, that testimony influenced the jury in reaching its verdict. *State v. Lamar*, 205 Ariz. 431, ¶ 40, 72 P.3d 831, 839 (2003).

¶16 Bell argues that T. made improper comments "over a period of two days" and that those comments created undue prejudice. But the only testimony Bell cites is a single comment that was interrupted by both the prosecutor and Bell's counsel. Apparently counsel was concerned that T. was about to refer to improper evidence of Bell's motorcycle gang associations. But because T. was interrupted, the jury never heard this evidence. Bell has not shown that this unfinished comment called the jury's attention to anything inappropriate

or that it influenced the verdict. *See id.* And because he has failed to develop any argument regarding other purportedly improper testimony by T., he has waived such argument on appeal. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also Bolton*, 182 Ariz. at 298, 896 P.2d at 838. Accordingly, we cannot say the trial court abused its discretion in denying the motion for mistrial. *See Stuard*, 176 Ariz. at 601, 863 P.2d at 893.

Refusing to Preclude Witnesses

¶17 Bell next argues the court erred in permitting two witnesses, S. and R., to testify regarding incidents that occurred both before and after the attack on T. and K. Bell asserts in the header of this claim that the testimony was inadmissible under Rule 404(b), Ariz. R. Evid. But in his analysis of S.'s testimony, Bell does not challenge admissibility under Rule 404(b) and has therefore abandoned any such argument. *See Carver*, 160 Ariz. at 175, 771 P.2d at 1390. Bell asserts only that the testimony was "more prejudicial than probative." But he does not provide sufficient argument or any citation to authority for this assertion and his argument is therefore waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *see also Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

¶18 As to R.'s testimony, Bell asserts it was inadmissible under Rule 404(b) because it was offered only to show he had a character trait of being jealous. We review the trial court's decision for an abuse of discretion. *See State v. Gulbrandson*, 184 Ariz. 46, 60, 906 P.2d 579, 593 (1995). Evidence that demonstrates the defendant's motive to commit the crimes at issue may be admissible under Rule 404(b). *See id.*; *see also State v. Williams*, 183

Ariz. 368, 377, 904 P.2d 437, 446 (1995) (evidence of prior misconduct may be admissible if it supplies motive for charged crime).

¶19 R. testified that he was friends with T. and at one time had a relationship with her. R. then described an incident when Bell, who appeared agitated, approached him in a restaurant and asked him if he was dating T., to which R. replied he was not. R. also testified that a couple weeks later, he was riding in a vehicle with T. Bell appeared on his motorcycle, passed the vehicle that T. and R. were in, and looked to see who was inside. R. testified that Bell then "flipped us off." Bell called T. on her cell phone a few minutes later. T. and R. then passed Bell sitting on the side of the road under a tree.

¶20 About one week after that, Bell approached R. in a bar and said he had a problem with R. and that "[i]f we weren't in public, I'd kick your ass." Bell again asked R. if he was dating T. because he had seen them together in the vehicle. R. described Bell's demeanor as being "more agitated" and "angry." During this same conversation, Bell made "a threat as to T[.]'s safety" and indicated he would arrange to have her hurt.

¶21 Bell argues the evidence was admitted to show he was jealous, that jealousy is a character trait and that therefore the evidence was inadmissible. But R.'s testimony did not just show that Bell was, in general, a jealous person. This evidence showed Bell was jealous of a man he suspected T. was dating, that he reacted violently to this suspicion, and that he had some plan to harm T. The trial court did not abuse its discretion in finding that the evidence went to Bell's motive for the attack on T. and the man she was actually dating,

K., and was therefore admissible under Rule 404(b). *See Williams*, 183 Ariz. at 377, 904 P.2d at 446; *see also State v. Robinson*, 165 Ariz. 51, 56-57, 796 P.2d 853, 858-59 (1990) (prior act evidence showing defendant's "obsession" with girlfriend properly admitted to show motive).

¶22 Bell also argues the prejudicial impact of R.'s testimony exceeded its probative value, citing Rule 403, Ariz. R. Evid. "'Evidence is unfairly prejudicial only when it has an undue tendency to suggest a decision on an improper basis such as emotion, sympathy, or horror.'" *State v. Connor*, 215 Ariz. 553, ¶ 39, 161 P.3d 596, 607 (App. 2007), *quoting Gulbrandson*, 184 Ariz. at 61, 906 P.2d at 594. Having reviewed the testimony, we conclude the trial court was well within its discretion to conclude the probative value of the testimony was not substantially outweighed by any danger of prejudice. *See id.*

¶23 In his reply brief, Bell states that he "reasserts his argument" that S. and R.'s testimony of Bell's other acts did not meet the clear and convincing standard required by *Terrazas*, 189 Ariz. at 582, 944 P.2d at 1196. But Bell did not make this argument in his opening brief and we do not address arguments raised for the first time in the reply brief. *State v. Guytan*, 192 Ariz. 514, ¶ 15, 968 P.2d 587, 593 (App. 1998).

Allowing Undisclosed Witness

¶24 Bell next contends the trial court erred in permitting a previously undisclosed witness to testify for the state to impeach the testimony of a defense witness. We review for an abuse of discretion a trial court's decision to permit an undisclosed witness to testify.

State v. Smith, 123 Ariz. 243, 252, 599 P.2d 199, 208 (1979). In determining whether to allow the witness, the trial court should consider how vital the witness is, whether the other party will be prejudiced by the testimony, whether the late disclosure was wilful or in bad faith, and any other relevant circumstances. *State v. Fisher*, 141 Ariz. 227, 246, 686 P.2d 750, 769 (1984). The trial court should impose sanctions that affect the trial of the merits as little as possible and should only prohibit the calling of a witness where other sanctions will not produce a just result. *Id*.

¶25 Bell concedes the state was not motivated by malice in not disclosing the witness. He urges, however, that "the witness was not vital to the [s]tate's case" and that the testimony was prejudicial. But even if this witness was not vital, Bell's claim of prejudice appears to be only that the witness was unreliable for various reasons.[2]

¶26 Bell, however, has not cited any authority for the proposition that the trial court should consider a late disclosed witness's reliability in determining whether to allow that witness to testify. Indeed, a witness's reliability "'goes to the weight of the statements, not their admissibility.'" *See State v. Alvarez*, 210 Ariz. 24, ¶ 17, 107 P.3d 350, 355 (App.

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[2]Bell also appears to claim that the witness's testimony was prejudicial because it "indicat[ed Bell] was guilty of the crime." But Bell presents no argument and cites no authority for this contention and it is therefore waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838. Moreover, even if this argument was not waived, the witness's testimony was permissible under the factors enumerated in *State v. Allred*, 134 Ariz. 274, 277, 655 P.2d 1326, 1329 (1982) (when determining if impeachment testimony is prejudicial, court should consider, among other things, whether the witness being impeached denies making the statement, as well as other factors affecting the reliability of the witness and whether the impeachment testimony is the only evidence of guilt).

2005), *vacated in part on other grounds*, 213 Ariz. 467, 143 P.3d 668 (App. 2006), *quoting State v. Whitney*, 159 Ariz. 476, 484, 768 P.2d 638, 646 (1989). What weight to give a witness's statements is something for the jury, not the trial court, to decide. *Id.*

¶27 Bell was permitted to interview the witness before he testified and he impeached the witness on cross-examination, raising multiple credibility challenges before the jury. Accordingly, we cannot say the trial court abused its discretion in rectifying any untimely disclosure. Bell has not demonstrated prejudice, and the trial court did not abuse its discretion in permitting the witness to testify. *See Smith*, 123 Ariz. at 252, 599 P.2d at 208.

Consecutive Sentences

¶28 Bell last argues that, under the test set forth in *State v. Gordon*, 161 Ariz. 308, 315, 778 P.2d 1204, 1211 (1989), the trial court erred in running his sentence for first-degree burglary consecutive to the sentences for the other felonies. Bell objected to the consecutive sentence below but did not articulate the same argument to the trial court that he now raises on appeal. We therefore review for fundamental error. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607; *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683-84 (App. 2008) (objection on one ground does not preserve another for appeal). The "imposition of an illegal sentence constitutes fundamental error." *State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002).

¶29 As provided in A.R.S. § 13-116, "A . . . [single] act or omission which is made punishable in different ways by different sections of the laws may be punished under both, but in no event may sentences be other than concurrent." To determine whether a defendant's conduct constituted a single act, we apply the three-part analysis provided in *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211.

> [We] consider[] the facts of each crime separately, subtracting from the factual transaction the evidence necessary to convict on the ultimate charge—the one that is at the essence of the factual nexus and that will often be the most serious of the charges. If the remaining evidence satisfies the elements of the other crime, then consecutive sentences may be permissible under A.R.S. § 13-116. In applying this analytical framework, however, we will then consider whether, given the entire "transaction," it was factually impossible to commit the ultimate crime without also committing the secondary crime. If so, then the likelihood will increase that the defendant committed a single act under A.R.S. § 13-116. We will then consider whether the defendant's conduct in committing the lesser crime caused the victim to suffer an additional risk of harm beyond that inherent in the ultimate crime. If so, then ordinarily the court should find that the defendant committed multiple acts and should receive consecutive sentences.

¶30 Bell's substantive argument on this issue is based upon Division One's holding in *State v. Brown*, 215 Ariz. 243, 159 P.3d 553 (App. 2007). But *Brown* was depublished in 2007 and therefore has no precedential value. *See State v. Brown*, 217 Ariz. 320, 173 P.3d 1021; *see also* Ariz. R. Sup. Ct. 111(c), (g); *State v. Rodriguez*, 198 Ariz. 139, n.5, 7 P.3d 148, 151 n.5 (App. 2000) (depublished case has no precedential value). Additionally, Bell misapplies the *Gordon* analysis, *see* 161 Ariz. at 315, 778 P.2d at 1211, by combining the

two ultimate crimes together, stating: "once we subtract evidence that Bell allegedly hit [the victims] with a bat and threatened them with a gun, no evidence remains to prove . . . Bell knowingly possessed a deadly weapon or dangerous instrument."

¶31 Moreover, Bell does not refer to *State v. Carreon*, 210 Ariz. 54, 107 P.3d 900 (2005), on which the state relies, or explain why that case does not control the result in this case. *See State v. Smyers*, 207 Ariz. 314, n.4, 86 P.3d 370, 374 n.4 (2004) (Court of Appeals bound by Arizona supreme court decisions). In *Carreon*, the defendant entered the victims' home, murdered one victim and attempted to murder the other. 210 Ariz. 54, ¶¶ 9-13, 107 P.3d at 905-06. Carreon was subsequently convicted of various offenses, including attempted murder and first-degree burglary. *Id.* ¶ 101. At sentencing, the trial court ordered that Carreon's sentence for first-degree burglary be served consecutively to his sentence for attempted murder. *Id.* Our supreme court agreed and affirmed Carreon's sentences as consistent with its holding in *Gordon*, 161 Ariz. at 315, 778 P.2d at 1211. *Carreon*, 210 Ariz. 54, ¶¶ 105-06, 107 P.3d at 920-21.

¶32 The facts in *Carreon* are extremely similar to those in this case. Both cases involved first-degree burglary and attempted murder convictions, and both defendants were sentenced to consecutive prison terms for those convictions. And the *Carreon* analysis of attempted murder would apply equally to the aggravated assault charges here. *See also State v. Hampton*, 213 Ariz. 167, ¶¶ 64-65, 140 P.3d 950, 965 (2006) (Section 13-116 "has never been interpreted literally" and does not "prevent consecutive sentences for crimes involving

multiple victims."). We therefore affirm Bell's sentences as consistent with our supreme court's holding in *Carreon*. 210 Ariz. 54, ¶¶ 105-06, 107 P.3d at 920-21.

Conclusion

¶33 In light of the foregoing, we affirm Bell's convictions and sentences.

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JOSEPH W. HOWARD, Chief Judge

CONCURRING:

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PHILIP G. ESPINOSA, Presiding Judge

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JOHN PELANDER, Judge