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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. RAMON FERNANDO BORBON, Appellant.	)	2 CA-CR 2009-0006 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF SANTA CRUZ COUNTY

Cause Nos. CR-07-151 and CR-06-097 (Consolidated)

Honorable James A. Soto, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Laura P. Chiasson
Tucson
Attorneys for Appellee

Thomas E. Higgins
Tucson
Attorney for Appellant

E S P I N O S A, Presiding Judge.

¶1 After a jury trial, Ramon Borbon was convicted of kidnapping, sexual assault, sexual abuse, and obstructing a criminal investigation or prosecution. He was sentenced to a combination of concurrent and consecutive, aggravated and presumptive

prison terms, amounting to over nine years' imprisonment. The court also required him to register as a sex offender. He challenges his convictions and sentences on a number of grounds. Finding no error, we affirm.

Factual and Procedural Background

¶2 On appeal, we view the facts in the light most favorable to sustaining Borbon's convictions and sentences. *See State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). The convictions stem from separate incidents involving two different victims, V. and T. In September 2005, V. had obtained an order of protection against an acquaintance, which she took to the Nogales Police Department to be served on him. There, she was introduced to Borbon, a police officer, who instructed her to return home and wait for him to bring paperwork to her apartment. That night, Borbon arrived and told V. he had been unable to serve the order of protection. He then entered her apartment, asking her not to turn on the lights. After speaking to her for a few minutes in the kitchen, Borbon went into V.'s adjacent bedroom. After coaxing V. onto the bed to discuss the order of protection, he kissed her, grabbed her by the arm, held her down on her bed, and penetrated her anally. Before Borbon left, he instructed V. not to report the incident, telling her he knew she had been raped previously and also knew her family, whose home address he recited. Borbon subsequently was charged with kidnapping and sexual assault of V.

¶3 In May 2006, T. reported that, one evening in August or September 2005 when she was sixteen years old, Borbon had touched her in a sexual manner. Borbon was a family friend and occasionally came to T.'s house to check on her and her siblings

while their mother worked late. This night, when Borbon came to their home, he went into T.'s bedroom to speak with her privately about school and her boyfriend. He sat next to T. on the bed, forcibly moved her hand back and forth over his penis, and attempted to kiss her. When T.'s sister entered the room, Borbon stopped, saying he had to leave. Before he left, he told T. that if she told anyone about the incident, he would have her mother deported and would break up their family by sending her siblings to different homes. T. remained silent until she heard of Borbon's arrest, at which point she told her mother and reported the incident to the Nogales Police Department and the Department of Public Safety.

¶4 After Borbon's first trial, on the charges pertaining only to V., resulted in a mistrial, the two cases were joined. Following a twelve-day jury trial, Borbon was convicted and sentenced as outlined above. The jury additionally found as an aggravating factor that, as to V., "at the time of [Borbon's] commission of the offenses, [he] was a public servant and the offense[s] involved conduct directly related to [his] office or employment." *See* A.R.S. § 13-701(D)(8). We have jurisdiction of this appeal pursuant to A.R.S. §§ 12-120.21(A) and 13-4033(A)(1).

Discussion

Other-Act Evidence

¶5 Borbon first argues the trial court erred in admitting testimony, pursuant to Rule 404(c), Ariz. R. Evid., showing he had a "character trait giving rise to an aberrant sexual propensity to commit" these sexual offenses. This testimony came from G., who stated that, when she was sixteen years old, Borbon had sat next to her on her living room

sofa, placed his hand on her leg and "move[d it] up more towards [her] vaginal area," at which point she stood up and left the room. Borbon claims the admission of this testimony was improper because it was unfairly prejudicial. We will not reverse a trial court's admission of evidence pursuant to Rule 404(c) absent an abuse of its discretion. *State v. Garcia*, 200 Ariz. 471, ¶ 25, 28 P.3d 327, 331 (App. 2001).

¶6 As Borbon correctly points out, before admitting other-act evidence, a trial court must first find that clear and convincing evidence exists, *see id.* n.1, from which a fact finder could conclude the defendant committed the other act; that the act would provide a "reasonable basis to infer" the defendant has a character trait causing an aberrant sexual propensity to commit the charged offense; and, considering the factors listed in Rule 404(c)(1)(C)(i) through (viii),[1] that the prejudice from such evidence does not overwhelm its probative value, Ariz. R. Evid. 404(c)(1). In admitting other-act evidence, a trial court must make specific findings as to each of these factors. Ariz. R. Evid. 404(c)(1)(D).

¶7 To the extent we understand Borbon's argument, which is somewhat disjointed and lacks meaningful discussion or citation to relevant authority,[2] he appears to

[1]These factors include: the remoteness of the other act, its similarity or dissimilarity to the charged crime, the strength of the evidence that the defendant committed the other act, the frequency of other acts, "surrounding circumstances," "relevant intervening events," and "other similarities or differences," as well as any other relevant factor. Ariz. R. Evid. 404(c)(1)(C)(i) through (viii).

[2]Although Borbon cites and extensively discusses *State v. Aguilar*, 209 Ariz. 40, 97 P.3d 865 (2004), he fails to explain how it requires the relief he seeks. Similarly, he cites a number of authorities that generally explain why unduly prejudicial evidence

contend G.'s testimony was unduly prejudicial because the trial court failed to assess her credibility, in breach of its duty to determine whether clear and convincing evidence existed that he had committed the prior act.[3] Borbon argues the trial court erred by "conclud[ing] that the [probative value of the] evidence of the act [he] committed . . . was not substantially outweighed by the danger of unfair prejudice without addressing the number of contradictions" in G.'s account or the fact that G. was under the influence of drugs and alcohol on the day she reported the incident.[4]

¶8 To the contrary, the trial court did address the issues Borbon contends made G.'s account unreliable. As the state points out, the court considered G.'s history of substance abuse as well as prior inconsistencies in her statements before concluding her "testimony ha[d] been consistent as to . . . [Borbon's] physical acts." Determining the credibility of witnesses is the province of the trial court, and we will not disturb its findings. *See State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). Because

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should not be admitted, but, like his citation to *Aguilar*, these citations do not actually advance his argument that G.'s testimony should not have been admitted.

[3]This argument appears to conflate the first and third factors of Rule 404(c)(1) analysis by concluding the evidence was prejudicial because G. was unreliable. Although we do not doubt a defendant could be prejudiced by the admission of an insufficiently proven prior act, the proper analysis here is not whether G.'s alleged unreliability made the evidence unduly prejudicial, but rather whether the trial court properly found clear and convincing evidence Borbon had committed the prior act against G.

[4]Additionally, Borbon notes the trial court did not "address that" his "sexual conduct with [G.] was non-consensual" nor that G. knew one of the victims and that his suspension from the police department was widely publicized. He does not explain how any of these details are relevant or show the trial court erred. Accordingly, any argument based on these assertions is waived. *See State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (argument waived if not properly developed).

the testimony of a single complaining witness can constitute proof beyond a reasonable doubt, *see State v. Williams*, 111 Ariz. 175, 177-78, 526 P.2d 714, 716-17 (1974), we cannot say that, after finding G. credible on this point, the trial court erred in concluding there was clear and convincing evidence Borbon had touched G. and consequently, in admitting her testimony.

Preclusion of Medical Records

¶9 Borbon next contends the trial court erred in precluding pursuant to A.R.S. § 13-1421, Arizona's rape shield statute, evidence that V. had previously contracted a sexually transmitted disease. For the first time on appeal, he contends he had a constitutional right to introduce this evidence and that it also fell under one of the exceptions to the rule generally barring a victim's sexual history in a prosecution for sexual offenses. *See* § 13-1421(A)(1)-(5). Because Borbon failed to make these arguments at trial, he is entitled to a review for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). However, Borbon does not meaningfully argue the trial court committed fundamental error and therefore has not sustained his burden for invoking fundamental error analysis. Although we will not ignore fundamental error if it is apparent, *see State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007), *cert. denied*, ___ U.S. ___, 129 S. Ct. 460 (2008), the failure to argue fundamental error generally waives such review, *see State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). Accordingly, we do not further address this claim.

Admission of Expert Testimony

¶10 Borbon also asserts the trial court erred in allowing the state's rape-trauma expert to testify, contending this testimony vouched for the victims' credibility and claiming the state cited the testimony in argument to "bolster, legitimize[,] and support the testimony of the victims." But, as the state points out, Borbon did not make any of these arguments in the trial court and the record reflects he did not object to most of the specific testimony and argument he now claims constituted error.[5] Accordingly, he would be entitled only to fundamental error review. *See Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. Again, however, he has failed to argue the court's alleged errors were fundamental, and no such error is apparent. *See Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650. Thus, Borbon has waived further review of this claim. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140.

Witness Preclusion

¶11 Borbon next claims the trial court abused its discretion by precluding the testimony of a psychiatrist[6] Borbon had intended to call to "testify consistent[ly]" with an

[5]At trial, the jury submitted several questions for this witness and, prior to asking them, the trial court conducted a bench conference. Although the record is unclear as to this point, it appears Borbon's counsel did object to asking whether false accusations of rape are common. Assuming he objected, thus preserving it as an issue on appeal, we find no error. When asked about false reporting, the witness responded that he "ha[d] never had that experience." As the state points out, in so answering, the witness merely reiterated his prior testimony, elicited by the prosecutor and by Borbon that he had not dealt with false reporting. *Cf. State v. Lindsey*, 149 Ariz. 472, 475, 720 P.2d 73, 76 (1986) (experts may not comment on credibility of particular witness or type of witness).

[6]The state takes issue with Borbon's references to this witness as an "expert," pointing out she was not designated as such in pretrial disclosure. But the issue is not the

independent medical examination (IME) report she had prepared, which the trial court had previously precluded.[7] Specifically, Borbon sought to have this witness testify about V.'s psychiatric condition, which he contends made her unable to "accurately remember events and thus [was probative of] her credibility concerning these events." We review a trial court's preclusion of an expert witness for an abuse of discretion. *State v. Gay*, 214 Ariz. 214, ¶ 37, 150 P.3d 787, 797 (App. 2007).

¶12 Citing *State v. Roberts*, 139 Ariz. 117, 121, 677 P.2d 280, 284 (App. 1983), Borbon contends he was entitled to present to the jury any evidence relevant to V.'s credibility. But, prior to trial, the court had granted the state's motion in limine to preclude the use of the IME based on the Arizona Constitution and our rape shield statute, and Borbon does not challenge that ruling on appeal.[8] To the extent the witness's testimony would have been a recitation of evidence properly excluded, Borbon had no right to present it. *See State v. Hardwick*, 183 Ariz. 649, 653, 905 P.2d 1384, 1388 (App. 1995) (party may not communicate through testimony substance of document whose content is inadmissible). If the testimony could have served any purpose other than to circumvent the trial court's preclusion order, Borbon failed to make an offer of proof, and

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witness's status as an expert but, rather, whether the trial court correctly excluded her testimony because she would have testified about the results of the independent medical examination, which had been precluded.

[7]The IME was prepared in connection with a civil lawsuit V. had brought against Borbon and the City of Nogales.

[8]In its motion to preclude the IME, the state also alleged that, for purposes of the criminal trial, Borbon had illegally obtained the IME in violation of Rule 15.1, Ariz. R. Crim. P., and the Victims' Bill of Rights, as codified in article II, § 2.1 of the Arizona Constitution.

we will not reverse a trial court based on speculation about what a precluded witness might have said. *See, e.g.*, *State v. Dickens*, 187 Ariz. 1, 13-14, 926 P.2d 468, 480-81 (1996) (ruling affirmed based on "sparse record" because defendant made no specific offer of proof); *State v. Walton*, 159 Ariz. 571, 581-82, 769 P.2d 1017, 1027-28 (1989) (affirming preclusion of evidence when defendant failed to make offer of proof).

¶13 Moreover, Borbon was able to challenge V.'s credibility at trial. As the state points out, pursuant to another of the trial court's rulings, other medical records of V.'s were admitted, from which Borbon argued she was not credible. Similarly, he impeached V. with the fact she had sued Borbon and the City of Nogales over this incident, giving her a motive to be untruthful during the criminal trial. Accordingly, we find the trial court did not abuse its discretion in precluding the psychiatrist's testimony.

Sentencing

¶14 Finally, Borbon contends the trial court committed fundamental error by imposing an aggravated sentence after finding one aggravating and one mitigating factor. Although it is somewhat unclear, Borbon's argument appears to be that the aggravating and mitigating factors essentially cancel each other out because there was one of each. But this is not the law. *See State v. Willcoxson*, 156 Ariz. 343, 347, 751 P.2d 1385, 1389 (App. 1987) ("In balancing aggravating and mitigating factors, the trial court is not required to make its decision based upon the mere numbers of aggravating or mitigating circumstances."). To the extent Borbon may be arguing the court improperly weighed the importance of the two factors, that contention is not supported by the record. At sentencing, the court discussed extensively the seriousness of the single aggravating

factor found by the jury: that Borbon had raped V. while he was a public servant engaged in conduct directly related to his employment. The court concluded Borbon's lack of a criminal record, the sole mitigating circumstance it had found, did not outweigh or counterbalance this aggravating circumstance. Borbon does not explain how the trial court abused its discretion in making this determination.

Disposition

¶15 Borbon's convictions and sentences are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge