

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

JUN -3 2013

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	2 CA-CR 2011-0370
Appellee,)	DEPARTMENT A
)	
v.)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
AARON LAMONT WILMORE,)	Rule 111, Rules of
)	the Supreme Court
Appellant.)	
)	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20091593001

Honorable Deborah Bernini, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Jonathan Bass

Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin

Tucson
Attorneys for Appellant

M I L L E R, Judge.

¶1 Aaron Wilmore appeals from his jury convictions for armed robbery and aggravated assault arising out of a credit union robbery. The jury also considered

multiple offenses arising out of an earlier bank robbery, but acquitted him of the charges. Wilmore argues the trial court erred in admitting evidence of a carjacking that had occurred before each robbery and in refusing to sever the separate robbery counts. He also argues the *State v. Portillo*, 182 Ariz. 592, 596, 898 P.2d 970, 974 (1995), jury instruction is unconstitutional. We affirm the convictions and sentences.

Factual and Procedural Background

¶2 On November 1, 2007, two men wearing gloves and ski masks robbed a bank at gunpoint and escaped in a car that had been carjacked the previous day. The car was found three days later. Two ski masks and three gloves were found in a nearby alleyway. Deoxyribonucleic acid (DNA) from one of the gloves matched Wilmore's profile.

¶3 On December 12, 2007, an unidentified male robbed a credit union at gunpoint while wearing a black mask and escaped in a sport utility vehicle that had also been carjacked the previous day. Police found the vehicle thirty minutes later, still running, with a gun and black beanie that had eyeholes. DNA from the beanie matched Wilmore's profile.

¶4 Wilmore was charged in a twenty-nine-count indictment that covered the events from both robberies. He was convicted on the charges relating to the credit union robbery but acquitted of multiple offenses arising from the earlier bank robbery. Wilmore was not charged with either carjacking. After the jury trial, Wilmore admitted

one historical prior. He was sentenced to four presumptive, concurrent terms of 11.25 years, consecutive to a presumptive term of 15.75 years. This appeal followed.

Discussion

Carjacking Evidence

¶5 Wilmore first argues that the evidence of the uncharged carjackings that occurred before both robberies should not have been admitted pursuant to Rule 404(b), Ariz. R. Evid. Additionally, anticipating the state’s argument that Rule 404(b) does not apply, he argues the carjacking testimony was unfairly prejudicial.

¶6 ““The trial court has considerable discretion in determining the relevance and admissibility of evidence, and we will not disturb its ruling absent a clear abuse of discretion.”” *State v. Bigger*, 227 Ariz. 196, ¶ 42, 254 P.3d 1142, 1154-55 (App. 2011), quoting *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990). Under an abuse of discretion standard of review, this court “uphold[s] a decision if there is ‘any reasonable evidence in the record to sustain it.’” *State v. Morris*, 215 Ariz. 324, ¶ 77, 160 P.3d 203, 220 (2007), quoting *State v. Veatch*, 132 Ariz. 394, 396, 646 P.2d 279, 281 (1982).

¶7 Before trial, Wilmore moved in limine to preclude testimony from carjacking victims R.B. and K.W., arguing he had not been charged with carjacking and the testimony would be unfairly prejudicial. Both R.B. and K.W. had their cars taken from them at gunpoint the day before the bank and credit union robberies, respectively. The court accepted the state’s contention that it planned to introduce the evidence of the

car thefts to establish a common scheme or plan committed by Wilmore, and found that the evidence supported the state's right to show opportunity, intent, knowledge, preparation, and plan pursuant to Rule 404(b). The court also found that the probative value of the evidence outweighed the potential for unfair prejudice; further, it would give the jury a limiting instruction on the proper use of the evidence. At trial, the state withdrew its assertion that Wilmore had committed the carjackings, but the court still gave the limiting instruction.

¶8 Wilmore's first contention regarding the testimony is that the trial court erred in its Rule 404(b) ruling by failing to conduct an evidentiary hearing or to make a specific finding that the state had proved with clear and convincing evidence that he had committed or participated in the carjackings.¹ *See generally, State v. Terrazas*, 189 Ariz. 580, 583-84, 944 P.2d 1194, 1197-98 (1997). The state responds that because it withdrew the claim that Wilmore had committed the carjackings, such findings are unnecessary. For the reasons set forth below, we agree.

¶9 Rule 404(b) prohibits evidence about other bad acts to show a defendant's propensity to act in a particular manner. *State v. Hargrave*, 225 Ariz. 1, ¶ 10, 234 P.3d 569, 576 (2010). In *State v. Machado*, 226 Ariz. 281, ¶¶15-16, 246 P.3d 632, 635 (2011), our supreme court held that when the bad acts evidence is offered by the defendant to prove that a third party committed the crime at issue, Rule 404(b) and its associated

¹Wilmore did not make this second argument to the trial court, which generally results in forfeiture of all but fundamental error review. *See State v. Henderson*, 210 Ariz. 561 ¶ 19, 115 P.3d 601, 607 (2005). The issue is moot, however, in view of our resolution of the evidentiary argument.

burden of proof of clear and convincing evidence do not apply. Rather, the evidence is analyzed pursuant to Rules 401 through 403. Although the evidence at issue here is not third-party culpability evidence, and is offered by the state to prove Wilmore committed the robberies, we find *Machado*'s reasoning instructive. The court noted that the rule's "central purpose is to protect criminal defendants from unfair use of propensity evidence," to establish guilt. *Id.* ¶ 14. The rule was designed to prevent the defendant from being convicted based on the jury's assumption that the defendant was bad. *Id.* That is not a risk here, where Wilmore was never identified as the carjacker and the state reminded the jury in closing arguments that Wilmore was not charged with those crimes. The trial court did not err in failing to conduct an evidentiary hearing or make specific findings connecting Wilmore to the carjacking.

¶10 Wilmore also argues that, if Rule 404(b) does not apply, the evidence was still not admissible pursuant to Rules 401-403, because the carjacking testimony was irrelevant and unduly prejudicial. Evidence is relevant if it tends to make the existence of a fact in issue more or less probable. *State v. Fulminante*, 193 Ariz. 485, ¶ 57, 975 P.2d 75, 92 (1999); *see* Ariz. R. Evid. 401(a). Evidence establishing identity and plan, specifically enumerated as proper purposes under Rule 404(b), may be relevant under Rules 401 and 402. *See State v. Roscoe*, 184 Ariz. 484, 493, 910 P.2d 635, 644 (evidence of similar acts establishing modus operandi relevant under Rule 402).

¶11 Wilmore contends that the only issue was whether he was one of the robbers and, therefore, whether the getaway cars had been carjacked had no bearing on

the question. The similarities of the sequences of events in the two robberies, however, establish a modus operandi that makes the evidence of the two carjackings relevant to the issue of identity. In both robberies, a vehicle was carjacked the day before, and when the vehicle was found after the robbery, items used in the robbery were found in or near the vehicle. In both of those instances, Wilmore's DNA was found on one of those items. Most important, the evidence completed the story about the abandonment of cars used in the robberies. The evidence of the carjackings is relevant. *See State v. Wehrhan*, 25 Ariz. App. 277, 279, 542 P.2d 1157, 1159 (1975) (evidence of one burglary relevant to other burglary with similar modus operandi).

¶12 Wilmore also argues that relevant evidence may be excluded if it is unduly prejudicial. Rule 403 requires the court to balance its probative value against the danger of unfair prejudice. Not all adverse evidence is unfairly prejudicial, rather, “[u]nfair prejudice results if the evidence has an undue tendency to suggest decision on an improper basis, such as emotion, sympathy, or horror.” *State v. Martinez*, 230 Ariz. 208, ¶ 21, 282 P.3d 409, 414 (2012), *quoting State v. Mott*, 187 Ariz. 536, 545, 931 P.2d 1046, 1055 (1997). Because identity was the key issue, the probative value was high. Any potential for prejudice was limited by the fact that the jury was repeatedly reminded that Wilmore was not charged with the carjackings and the carjacking victims did not identify Wilmore as the carjacker. The prejudicial nature of the testimony did not substantially outweigh the probative value. *See Machado*, 226 Ariz. 281, ¶ 25, 246 P.3d at 637 (where

only issue is who committed murder, phone call going directly to issue outweighed risk of confusion or unfair prejudice).

¶13 Assuming for the purpose of Wilmore's argument that the evidence was erroneously admitted, any error was harmless. The jury heard multiple eyewitness descriptions of the gun and black ski mask worn by the robber at the credit union, which matched the gun and beanie with eye holes found thirty minutes later in an SUV found parked in an alley. The SUV matched the description and license plate number provided by a witness who watched the robber exit the bank and drive away in the SUV. Wilmore's DNA was found on the beanie in the SUV. Additionally, the jury acquitted Wilmore of the bank robbery, despite admission of the related carjacking testimony. Any error in admitting the testimony was harmless on the record before us. *See State v. Lacy*, 187 Ariz. 340, 349, 929 P.2d 1288, 1297 (1996) (erroneous admission of burglary evidence under Rule 404(b) harmless based on totality of evidence and limiting instruction).

Motion to Sever

¶14 Wilmore also contends that the trial court erred when it did not sever the robbery counts relating to the credit union from those relating to the bank. Wilmore moved to sever the counts before trial and the court denied his motion, but he did not renew his motion after the trial started, therefore we review only for fundamental error. *See State v. Flythe*, 219 Ariz. 117, ¶ 10-11, 193 P.3d 811, 814 (App. 2008); Ariz. R. Crim. P. 13.4(c). Under this standard of review, the defendant has the burden of

establishing “both that fundamental error exists and that the error in his case caused him prejudice.” *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

¶15 Assuming for the purpose of argument that the trial court erred by not severing the charges, Wilmore has failed to “demonstrate a compelling prejudice against which the trial court was unable to protect.” *State v. Hausner*, 230 Ariz. 60, ¶ 48, 280 P.3d 604, 619 (2012), *quoting State v. Prince*, 204 Ariz. 156, ¶ 13, 61 P.3d 450, 453 (2003). Wilmore asserts the prejudice is inherent when evidence of similar other bad acts is admitted. Acknowledging that the jury acquitted him of the bank robbery counts, he insists that the information about that robbery “must have influenced [the jury’s] verdict on the Credit Union counts.” Wilmore also acknowledges that the jurors were instructed to decide each count separately but argues that the standard instruction cannot resolve severance issues in every situation.

¶16 Wilmore does not explain how he was prejudiced in the case at hand. “[T]he showing required to establish prejudice . . . differs from case to case.” *Henderson*, 210 Ariz. 561, ¶ 26, 115 P.3d at 608. Further, a defendant may not rely on speculation to meet his burden of showing prejudice on fundamental error review. *State v. Martin*, 225 Ariz. 162, ¶ 15, 235 P.3d 1045, 1049 (App. 2010); *State v. Doerr*, 193 Ariz. 56, ¶ 18, 959 P.2d 1168, 1173 (1998) (reviewing court will not “indulge in . . . guesswork” based on mere speculation). To show prejudice here, Wilmore must show that a reasonable jury, hearing only the facts of the credit union case, “could have reached a different result.”

State v. Joyner, 215 Ariz. 134, ¶ 31, 158 P.3d 263, 273 (App. 2007), quoting *Henderson*, 210 Ariz. 561, ¶ 27, 115 P.3d at 609.

¶17 Even if the bank robbery counts had been severed, the jury would still have had extensive evidence connecting Wilmore to the credit union robbery, as detailed above. And, although Wilmore seeks to minimize its importance, the jury received the limiting instruction requiring it to decide each count separately, uninfluenced by its decision as to any other count. We presume the jury follows the court’s instructions. See *State v. Newell*, 212 Ariz. 389, ¶ 68, 132 P.3d 833, 847 (2006). Finally, the jury’s acquittal of Wilmore on all of the bank robbery counts also indicates that the jury followed its instructions and considered the evidence separately. See *State v. Stuard*, 176 Ariz. 589, 600, 863 P.2d 881, 892 (1993). Wilmore has not met his burden of showing prejudice.

Reasonable Doubt Instruction

¶18 Wilmore last argues that the trial court erred in instructing the jury on reasonable doubt pursuant to *Portillo*, 182 Ariz. at 596, 898 P.2d at 974. Citing Hawaii court opinions, Wilmore urges the court to find that the use of the phrases “real possibility” and “firmly convinced,” as used in the jury instructions in his case, more closely define a “clear and convincing” standard, and therefore violate a defendant’s rights to due process of law. See *State v. Perez*, 976 P.2d 427, 441-42 (Haw. Ct. App. 1998), *rev’d in part*, 976 P.2d 379 (Haw. 1999).

¶19 ““This court is bound by the decisions of the Arizona Supreme Court and has no authority to overturn or refuse to follow its decisions.”” *State v. McPherson*, 228 Ariz. 557, ¶ 13, 269 P.3d 1181, 1186 (App. 2012), *quoting State v. Long*, 207 Ariz. 140, ¶ 23, 83 P.3d 618, 623 (App. 2004). Our supreme court has repeatedly reaffirmed a preference for the *Portillo* instruction, *see, e.g., State v. Dann*, 205 Ariz. 557, ¶ 74, 74 P.3d 231, 249-50 (2003), and has expressly rejected arguments based on the *Perez* decision from Hawaii. *State v. Ellison*, 213 Ariz. 116, ¶ 63, 140 P.3d 899, 916 (2006); *State v. Van Adams*, 194 Ariz. 408, ¶¶ 29-30, 984 P.2d 16, 25-26 (1999). Wilmore acknowledges this and merely seeks to preserve the issue for further review. We conclude the trial court did not err by providing a reasonable doubt instruction as set forth in *Portillo*.

Disposition

¶20 For the foregoing reasons, Wilmore’s convictions and sentences are affirmed.

/s/ Michael Miller

MICHAEL MILLER, Judge

CONCURRING:

/s/ Peter J. Eckerstrom

PETER J. ECKERSTROM, Presiding Judge

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge