

INTRINSIC/EXTRINSIC EVIDENCE

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ADMITTING EVIDENCE REGARDING APPELLANT'S PRESENCE AT FAMOUS SAMS THE NIGHT BEFORE THE SHOOTINGS.

Appellant asserts that the trial court committed reversible error in admitting evidence that he tried to enter Famous Sams the night before the shootings with a gun, was thrown out, and beaten up. The trial court acted well within its considerable discretion in admitting this evidence because it was relevant and extremely probative to prove motive, identity, and intent.

A. STANDARD OF REVIEW.

A trial court's ruling regarding the admissibility of evidence will not be disturbed on appeal "absent a clear abuse of its considerable discretion." *State v. Alatorre*, 191 Ariz. 208, 211, ¶ 7, 953 P.2d 1261, 1264 (App. 1998); *see also State v. Miller*, 187 Ariz. 254, 257, 928 P.2d 678, 581 (App. 1996) ("Decisions regarding the relevance and admissibility of evidence lie within the sound discretion of the trial court"). An appellate court will not "second-guess a trial court's ruling on the admissibility or relevance of evidence." *State v. Spreitz*, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997).

Moreover, this Court will affirm a trial court's ruling admitting other act evidence, even if the trial court admitted the evidence for the wrong reason. *State v. Andriano*, 215 Ariz. 497, 503, ¶ 23, 161 P.3d 540, 546 (2007); *State v. Varela*, 178 Ariz. 319, 323, 873 P.2d 657, 661 (App. 1993).

B. FACTUAL BACKGROUND.

The State filed a pretrial motion *in limine*, noticing its intent to present at trial, evidence that the night prior to the shootings giving rise to the charges, Appellant was in possession of a Ruger handgun, became involved in an altercation at Famous Sams, left a bloody handprint on the wall outside Famous Sams, and threatened to return and seek revenge. (R.O.A., Item 11 at 1–4.) The State asserted that this evidence was “intrinsic” to the crimes charged. (*Id.* at 5–7.) The State asserted that the evidence was also admissible under Rule 404(b) of the Arizona Rules of Evidence to prove motive and intent. (*Id.* at 7–9.) The trial court found that the evidence was intrinsic, and ruled it admissible. (R.T. 11/30/11, at 51.)

C. APPLICABLE LAW.

In *State v. Ferrero*, 229 Ariz. 239, 243, ¶ 20, & n.4, 274 P.3d 509, 513 (2012), the Arizona Supreme Court significantly narrowed the scope of “intrinsic” evidence, effectively overruling, or abrogating, a slew of prior decisions of both that and this Court. The supreme court limited the scope of intrinsic evidence to evidence that: “(1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act.” *Id.*, ¶ 20. However the supreme court made clear that much of what was previously considered “intrinsic” evidence would, nonetheless, be admissible

under Rule 404(b) of the Arizona Rules of Evidence: “Our narrow definition of intrinsic evidence will not unduly preclude relevant evidence of a defendant’s other acts. Non-intrinsic evidence will often be admissible for non-propensity purposes under Rule 404(b).” *Id.* at 514, ¶ 23, 274 P.3d at 244. In fact, the supreme court quoted with approval the following:

[I]t is unlikely that our holding will exclude much, if any, evidence that is currently admissible as background or “completes the story” evidence under the inextricably intertwined test. We reiterate that the purpose of Rule 404(b) is simply to keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person, implying that the jury needn’t worry over much about the strength of the government’s evidence. No other use of prior crimes or other bad acts is forbidden by the rule, and one proper use of such evidence is the need to avoid confusing the jury. Thus, most, if not all, other crimes evidence currently admitted outside the framework of Rule 404(b) as “background” evidence will remain admissible under the approach we adopt today. The only difference is that the proponent will have to provide notice of his intention to use the evidence, and identify the specific, non-propensity purpose for which he seeks to introduce it (*i.e.*, allowing the jury to hear the full story of the crime). Additionally, the trial court will be required to give a limiting instruction upon request.

Id. (quoting *United States v. Green*, 617 F.3d 233, 249 (3rd Cir. 2010)).¹

Evidence is admissible under Rule 404(b) for *any* relevant purpose other than proving “the character of a person in order to show action in conformity therewith.” Ariz. R. Evid. 404(b); *see also State v. Jeffers*, 135 Ariz. 404, 417, 661

¹ The same is *not* true regarding Rule 404(c) of the Arizona Rules of Evidence because such evidence, is, in fact, “offered to prove the defendant’s propensity to commit the charged act,” and the trial court must screen the evidence as required by Rule 404(c). *See Ferrero*, 229 Ariz. at 245, ¶ 28, 274 P.3d at 515.

P.2d 1105, 1118 (1983) (“The list of ‘other purposes’ in rule 404(b), for which other crime may be shown, is not exclusive; if evidence is relevant for any purpose other than that of showing a defendant’s criminal propensities, it is admissible. . . .”). Also, Rule 404(b) is “a rule of inclusion,” and precludes the admission of other acts “only when [they are] offered for the sole purpose of proving character.” *State v. Terrazas*, 189 Ariz. 580, 588, 944 P.2d 1194, 1202 (1997); *see also Huddleston v. United States*, 485 U.S. 681, 687 (1988) (noting that Federal Rule of Evidence 404(b) does not “flatly prohibit the introduction” of certain evidence, but instead, “protects against the introduction of extrinsic act evidence when that evidence is offered solely to prove character”).

Pursuant to Rule 404(b):

[E]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, *such as* proof of *motive*, opportunity, *intent*, preparation, plan, knowledge, *identity*, or absence of mistake or accident.

(Emphasis added.) To be admissible under Rule 404(b): (1) the prior act evidence must be relevant and admissible for a proper purpose; (2) the prior act must be established by clear and convincing evidence; (3) the prejudicial value of the prior act must not substantially outweigh its probative value; and (4) the trial court must give a limiting instruction concerning the use of the evidence if requested by the

defendant. *State v. Nordstrom*, 200 Ariz. 229, 248, ¶ 54, 25 P.3d 717, 736 (2001); *State v. Mills*, 196 Ariz. 269, 274–75, ¶ 24, 995 P.2d 705, 710–11 (App. 1999).

D. ANALYSIS.

Although the trial court ruled the evidence admissible as “intrinsic” evidence, it does not appear to meet the narrowed standard set forth in *Ferrero*. However, the evidence was clearly admissible pursuant to Rule 404(b) to prove Appellant’s motive to fire shots into Famous Sams, his intent in doing so, and to prove the identity of the shooter. *See Ferrero*, 229 Ariz. at 514, ¶ 23, 274 P.2d at 244; *Andriano*, 215 Ariz. at 503, ¶ 23, 161 P.3d at 546.

Appellant’s animosity toward Cooper, and Famous Sams in general, was extremely probative to establishing his motive to fire seven shots into the front door of Famous Sams. The night prior to the shootings, Appellant was severely beaten by Cooper, the manager at Famous Sams, and humiliated in front of his girlfriend. (R.T. 6/5/12, at 36, 51–52, 117, 121, 188–89.) Appellant was so upset and humiliated that he began yelling and making threats, stating, “I’ll be back. You’re all dead.” (*Id.* at 52; R.T. 6/4/12, at 91–92; R.T. 6/6/12, at 66; R.T. 6/11/12, at 108–10.) Appellant made his motive crystal clear. Motive is clearly a “proper purpose” for admitting other act evidence. *See, e.g., State v. Hardy*, 230 Ariz. 281, 289, ¶ 38, 283 P.3d 12, 20 (2012) (“Evidence of prior argument with or violence toward a victim is [] admissible to show motive or intent”); *State v. Johnson*, 212

Ariz. 425, 430, ¶ 12, 133 P.3d 735, 740 (2006) (evidence of defendant’s gang involvement admissible to prove motive to kill victim to eliminate her as a witness and to further the criminal objections of the gang); *State v. Gulbrandson*, 184 Ariz. 46, 61, 906 P.2d 579, 594 (1995) (evidence of prior assault on victim admissible to prove “motive and intent”); *State v. Mills*, 196 Ariz. 269, 275, ¶ 26, 995 P.2d 705, 711 (App. 1999) (evidence that defendant had previously cut victim’s brake line admissible to prove motive for murder).

Similarly, the evidence was admissible to prove intent. *See Hardy*, 230 Ariz. at 289, ¶ 38, 283 P.3d at 20 (evidence of prior argument or violence admissible to prove intent); *Gulbrandson*, 184 Ariz. at 61, 906 P.2d at 594 (evidence of previous assault “shows motive and intent”); *Mills*, 196 Ariz. at 275, ¶ 26, 995 P.2d at 711 (evidence that defendant had previously cut the victim’s break line admissible to prove intent to kill victim).

The evidence was also admissible to prove the identity of the shooter. *See Johnson*, 212 Ariz. at 430, ¶ 12, 133 P.3d at 740 (evidence of defendant’s gang involvement admissible to help prove identity of defendant in committing murder and other crimes); *Nordstrom*, 200 Ariz. at 249–50, ¶ 65, 25 P.3d at 737–38 (evidence that defendant and another person were in possession of weapons of the type used in commission of murders hours earlier admissible to prove identity).

Appellant focuses upon “evidence of him trying to enter the Famous Sam’s the night before the shootings with a gun,” claiming (erroneously) that it was admitted to show that “he must have been the man with the gun the following night.” (O.B. at 18.) Not so. Evidence regarding the gun was clearly admissible to prove identity by tying Appellant to the gun used the following night to commit the shootings. Robert Ulich testified that the gun Appellant possessed on Thursday night was a “Ruger” semiautomatic handgun (R.T. 6/11/12, at 97–100)—the same type of gun Appellant had on used in the shootings the following night, *and* the same type of gun Appellant possessed a year later.² Thus, separate and apart from proving motive and intent, evidence that Appellant possessed the same type of gun used in the shootings was relevant and extremely probative to prove his identity as the shooter. *See Nordstrom*, 200 Ariz. at 249–50, 25 P.3d at 737–38 (evidence that defendant and another person were “in possession of weapons of the same type” used hours later in committing murders relevant and admissible to prove identity and opportunity); *State v. Dickens*, 187 Ariz. 1, 18–19, 926 P.2d 468, 485–86 (1996) (evidence that defendant stole a gun from a co-worker in California admissible to prove that Appellant, and not his accomplice, procured the gun used to commit the murders).

² At trial, Appellant claimed that the gun he possessed on Thursday January 26, 2006, was not the same gun he possessed when arrested on January 25, 2007, which was shown to be the same gun used in the January 27, 2006 shootings. (R.T. 6/28/12, at 48.)

The State did not offer evidence of the Thursday night incident to prove that Appellant has a character for getting beat up, or that he acted in conformity with that character in committing the crimes the following night. Nor was the evidence admitted to show that Appellant had a propensity to attempt to sneak guns into bars, or to show that he was a bad person. As discussed above, the evidence was admissible to prove motive, intent, and to assist in identifying Appellant as the person who fired the shots into Famous Sams the following night.

Because the trial court admitted the evidence as “intrinsic” evidence it did not make a specific finding that the jurors could find by “clear and convincing evidence” that Appellant was the same person that got beat up at Famous Sams the night before the shootings. *See Nordstrom*, 200 Ariz. at 248, ¶ 57, 25 P.3d at 736; *State v. Terrazas*, 189 Ariz. 580, 582, 944 P.2d 1194, 1196 (1997). However, the State proved it to an absolute certainty, and Appellant conceded it at trial. (R.T. 6/28/12, at 47, 67–68, 91.) Margaret Finn, Cooper Redmond, Esmeralda Mesa (Appellant’s girlfriend), Robert Ulich, and Lucy Munoz *all* testified that Appellant was the person Cooper beat up at Famous Sams the night before the shootings. (R.T. 6/4/12, at 83–84; R.T. 6/5/12, at 41–42, 177; R.T. 6/11/12, at 98–99; R.T. 6/19/12, at 27–29.) And, DNA analysis established that he left the bloody handprint on the exterior wall at Famous Sams after he was beat up by Cooper. (R.T. 6/12/12, at 52–53, 56; R.T. 6/14/12, at 155, 159.) Thus, the evidence clearly

“satisfied the *Terrazas* standard.” *Nordstrom*, 200 Ariz. at 248, ¶ 57, 25 P.3d at 736.

The trial court did not make an explicit Rule 403 ruling because Appellant never raised a Rule 403 objection. Where, as in the present case, a party does not raise a Rule 403 objection, the trial court is not obligated to make a Rule 403 ruling. See *State v. Cannon*, 148 Ariz. 72, 76, 713 P.2d 273, 277 (1985); *State v. Salman*, 182 Ariz. 359, 365, 897 P.2d 661, 667 (App. 1994). In such a situation, any Rule 403 objection has been “waived” and is not subject to appellate review. *State v. Montano*, 204 Ariz. 413, 425, ¶ 58, 426, ¶ 63, 65 P.3d 61, 73, 74 (2003); *State v. Gonzales*, 181 Ariz. 502, 511, 892 P.2d 838, 847 (1995); see also *In re Jaramillo*, 217 Ariz. 460, 465, ¶ 18, 176 P.3d 28, 33 (App. 2008) (defendant waived trial court’s failure to make express Rule 403 findings by failing to request such findings in trial court). Moreover, the trial court is presumed to know and follow the rules of evidence in making its evidentiary rulings. *State v. Warner*, 159 Ariz. 46, 52, 764 P.2d 1105, 1111 (1988); see also *State v. Ramirez*, 178 Ariz. 116, 128, 871 P.2d 237, 249 (1994) (“[T]he trial court is presumed to know and follow the law”); *State v. Williams*, 220 Ariz. 331, 334, ¶ 9, 206 P.3d 780, 783 (App. 2008) (“Trial judges are presumed to know the law and to apply it in making their decision”) (quoting *State v. Trostle*, 191 Ariz. 4, 22, 951 P.2d 869, 887 (1997)). And, the danger of “unfair” prejudice was virtually non-existent because it was

neither a “crime” (as far as the jurors knew) nor a “wrong” for Appellant to possess a gun or get beat up. The *only* way the evidence could “prejudice” Appellant was to show that he had a strong motive to seek revenge against Cooper and Famous Sams, and to tie him and his gun to the shootings. This was, therefore, “prejudicial” “in the sense that all good relevant evidence is.” *State v. Schurz*, 176 Ariz. 46, 52, 859 P.2d 156, 162 (1993).

Finally, the trial court gave the following limiting instruction:

Evidence of other acts has been presented. You may consider these acts only if you find that 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 or 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.

(R.T. 6/27/12, at 140.) The jurors are presumed to have followed this limiting instruction. *See State v. Newell*, 212 Ariz. 389, 403, ¶ 68, 132 P.3d 833, 847 (2006); *State v. LeBlanc*, 186 Ariz. 437, 439, 924 P.2d 441, 443 (1996).

The trial court acted well within “its considerable discretion” in admitting evidence regarding Appellant’s presence at Famous Sams the night prior to the shootings. *Alatorre*, 191 Ariz. at 211, ¶ 7, 953 P.2d at 1264. The trial court did not abuse its discretion in admitting the evidence.

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Supreme Court of Arizona,
 En Banc.
 STATE of Arizona, Appellee,
 v.
 Patrick M. FERRERO, Appellant.

No. CR-11-0127-PR.
 April 11, 2012.

Background: Defendant was convicted in the Superior Court, Maricopa County, No. CR2009-103770-001DT, Joseph C. Kreamer, J., of three counts of sexual conduct with a minor. Defendant appealed. The Court of Appeals, 2011 WL 1326208, affirmed in part and reversed in part. State filed petition for review.

Holdings: The Supreme Court, Berch, C.J., held that (1) when the prosecution offers evidence of a prior similar sexual offense committed against the same child to prove the defendant's propensity to commit the charged sexual offense, the evidence must be screened under rule governing admissibility of propensity evidence in a sexual misconduct case; abrogating, *State v. Alatorre*, 191 Ariz. 208, 953 P.2d 1261, *State v. Jones*, 188 Ariz. 534, 937 P.2d 1182, and (2) uncharged sexual conduct evidence was subject to screening for admissibility under rule governing admissibility of propensity evidence in a sexual misconduct case; abrogating, *State v. Andriano*, 215 Ariz. 497, 161 P.3d 540, *State v. Dickens*, 187 Ariz. 1, 926 P.2d 468, *State v. Nordstrom*, 200 Ariz. 229, 25 P.3d 717, *State v. Herrera*, 226 Ariz. 59, 243 P.3d 1041.

Vacated and remanded.

West Headnotes

[1] Criminal Law 110 🔑373.10

110 Criminal Law
 110XVII Evidence
 110XVII(F) Other Misconduct by Accused
 110XVII(F)12 Nature and Circumstances
 of Other Misconduct Affecting Admissibility
 110k373.7 Similarity to Crime Charged
 110k373.10 k. Sex offenses. Most
 Cited Cases

Criminal Law 110 🔑374.24

110 Criminal Law
 110XVII Evidence
 110XVII(F) Other Misconduct by Accused
 110XVII(F)13 Proof and Effect
 110k374.21 Determination of Admissibility
 110k374.24 k. Findings and statement of reasons. Most Cited Cases

Rule of evidence governing admissibility of propensity evidence in sexual misconduct cases expressly permits evidence of other similar crimes, wrongs, or acts to prove defendant's character trait giving rise to an aberrant sexual propensity to commit the charged offense, but only if the court first makes specific findings that defendant committed the other act, that the other act provides a reasonable basis from which the jurors may infer that defendant had the propensity to commit the charged act, and that the value of the other act evidence is not substantially outweighed by prejudice to defendant. 17A A.R.S. Rules of Evid., Rule 404(c)(1)(A-D).

[2] Criminal Law 110 🔑373.10

110 Criminal Law
 110XVII Evidence
 110XVII(F) Other Misconduct by Accused
 110XVII(F)12 Nature and Circumstances
 of Other Misconduct Affecting Admissibility
 110k373.7 Similarity to Crime Charged

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110k373.10 k. Sex offenses. Most
 Cited Cases

Criminal Law 110 373.14

110 Criminal Law

110XVII Evidence

110XVII(F) Other Misconduct by Accused

110XVII(F)12 Nature and Circumstances
 of Other Misconduct Affecting Admissibility

110k373.7 Similarity to Crime Charged

110k373.14 k. Same or identical
 victims. Most Cited Cases

Evidence of defendant's uncharged act of forcing child victim to expose his genitals to defendant, offered by the state to show that defendant had the emotional propensity to engage in sexual misconduct with victim, was subject to screening for admissibility under rule governing admissibility of propensity evidence in a sexual misconduct case, in prosecution for sexual conduct with a minor, as the uncharged act was offered to show that defendant had a character trait giving rise to an aberrant sexual propensity to commit offense charged, and evidence was not intrinsic part of charged act, such as would exempt it from screening under the rule, in that previously forcing victim to expose himself did not directly prove that defendant later committed the charged offense. Fed.Rules Evid.Rule 404(c), 28 U.S.C.A.

**510 Thomas C. Horne, Arizona Attorney General by Kent E. Cattani, Chief Counsel, Criminal Appeals/Capital Litigation, Robert A. Walsh, Assistant Attorney General, Phoenix, Attorneys for State of Arizona.

James J. Haas, Maricopa County Public Defender by Christopher V. Johns, Deputy Public Defender, Phoenix, Attorneys for Patrick Michael Ferrero.

OPINION

BERCH, Chief Justice.

*240 ¶ 1 The issue in this case is whether, in a

prosecution for sexual offenses, evidence of similar sexual conduct with the same minor victim is “intrinsic evidence” that is not governed by Arizona Rule of Evidence 404(c). We also consider whether the type of evidence described in *State v. Garner*, 116 Ariz. 443, 569 P.2d 1341 (1977), is inherently intrinsic to the charged act. We conclude that Rule 404(c) does not apply to truly intrinsic evidence, but that *Garner* evidence is not inherently intrinsic.

I. FACTS AND PROCEDURAL BACKGROUND

¶ 2 Patrick Ferrero was charged with three counts of sexual conduct with a minor. Over Ferrero's objection, the trial court admitted evidence of “other uncharged acts” with the minor to show Ferrero's “sexual disposition” toward him. Although the judge did not screen the evidence under Rule 404(c), he nonetheless instructed the jurors that they could consider the evidence to establish that Ferrero had a character trait “that predisposed him to commit the crimes charged.” The jury found Ferrero guilty on all three counts.

¶ 3 The court of appeals reversed Ferrero's convictions on two counts and found any error as to the third count (which is not before us) harmless. The court held that the trial judge must screen “*Garner* evidence” under Rule 404(c) and its failure to do so required reversal. *State v. Ferrero*, 1 CA-CR 10-0276, 2011 WL 1326208, at *4 ¶ 16 (Ariz.App. Apr.7, 2011) (mem. decision).

¶ 4 We granted the State's petition for review because the proper interpretation of Rule 404 is an issue of statewide importance. We have jurisdiction pursuant to *241**511Article 6, Section 5(3) of the Arizona Constitution and Arizona Revised Statutes § 12-120.24 (2003).

II. DISCUSSION

¶ 5 Rule 404 controls the admission of character and “other act” evidence. Section 404(b) *prohibits* evidence of other crimes, wrongs, or acts to prove the defendant's character to act in a certain way, but may allow such evidence for other pur-

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poses, such as showing “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Ariz. R. Evid. 404(b).

[1] ¶ 6 Section 404(c) applies to propensity evidence in sexual misconduct cases. It expressly *permits* evidence of other similar crimes, wrongs, or acts to prove the defendant's character trait giving rise to an aberrant sexual propensity to commit the charged offense, but only if the court first makes specific findings.^{FN1} *Id.* 404(c)(1).

FN1. The state must prove that the defendant committed the other act, that the other act provides a reasonable basis from which the jurors may infer that the defendant had the propensity to commit the charged act, and that the value of the other act evidence is not substantially outweighed by prejudice to the defendant. *See* Ariz. R. Evid. 404(c)(1)(A)-(D); *see also id.*, cmt. to 1997 amd. (citing *State v. Terrazas*, 189 Ariz. 580, 584, 944 P.2d 1194, 1198 (1997) (requiring that commission of the other act be shown by clear and convincing evidence)).

¶ 7 Arizona opinions provide imprecise guidance about the proper application of sections (b) and (c) of Rule 404, particularly in sex offense cases. We therefore take this opportunity to clarify the terms “*Garner* evidence” and “intrinsic evidence” and address the application of Rule 404 to such evidence.

A. *Garner* Evidence

¶ 8 We begin by addressing what has become known as “*Garner* evidence.” *See Garner*, 116 Ariz. at 447, 569 P.2d at 1345. The defendant in *Garner* was charged with sexually assaulting his minor son. *Id.* at 445, 569 P.2d at 1343. To prove the defendant's propensity to commit the charged crime, the prosecutor offered evidence that, on two occasions more than a year before the charged act, the defendant had oral sex with the boy. *Id.* at

445–46, 569 P.2d at 1343–44. On review, this Court stated that, “[i]n a case involving a sex offense committed against a child, evidence of a prior similar sex offense committed against the same child is admissible to show the defendant's lewd disposition or unnatural attitude toward the particular victim.” *Id.* at 447, 569 P.2d at 1345 (citing *People v. Sylvia*, 54 Cal.2d 115, 4 Cal.Rptr. 509, 351 P.2d 781, 785 (1960)).

¶ 9 Some courts have read *Garner* as creating an exception to the common law rule—now codified in Rule 404(b)—barring admission of other acts to prove a defendant's propensity to act in a certain way.^{FN2} *See, e.g., State v. Alatorre*, 191 Ariz. 208, 213, 953 P.2d 1261, 1266 (App.1998); *State v. Jones*, 188 Ariz. 534, 539, 937 P.2d 1182, 1187 (App.1996). These courts have interpreted *Garner* as always allowing the admission of evidence of prior sexual acts with the same child victim, even if offered to prove the defendant's propensity to commit the charged act.

FN2. *Garner* cites cases admitting “other act” evidence to show a common scheme or plan and distinguishes the propensity exception created by *State v. McFarlin*, 110 Ariz. 225, 517 P.2d 87 (1973), and *State v. Treadaway*, 116 Ariz. 163, 568 P.2d 1061 (1977). This suggests that the Court may have simply meant to recognize another exception to the common law rule, similar to the exceptions for plan, intent, motive, or opportunity. *See Garner*, 116 Ariz. at 447, 569 P.2d at 1345 (citing *State v. Van Winkle*, 106 Ariz. 481, 482, 478 P.2d 105, 106 (1970) (admitting evidence of prior sexual assaults to show a “system, plan and scheme”); *State v. Finley*, 108 Ariz. 420, 421, 501 P.2d 4, 5 (1972) (similar)); *cf. State v. Vega*, 228 Ariz. 24, 32 ¶¶ 34–35, 262 P.3d 628, 636 (App.2011) (Thompson, J., concurring). This reading is supported by the comments to Rule 404(c), which do not mention

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Garner and affirmatively state that Rule 404(c) is intended to substantially codify the *McFarlin/ Treadaway* rule. Ariz. R. Evid. 404 cmt. to 1997 amd.

¶ 10 Twenty years after *Garner*, however, this Court promulgated Rule 404(c). See Ariz. R. Evid. 404(c), cmt. to 1997 amd. The court of appeals subsequently recognized that automatic admission of *Garner* evidence in cases involving sexual offenses conflicts with 404(c), which permits use of evidence of other acts to show the defendant's "aberrant sexual propensity to commit the crime *242 **512 charged" only if certain criteria are met. *State v. Garcia*, 200 Ariz. 471, 476 ¶ 31, 28 P.3d 327, 332 (App.2001). Thus, *Garcia* held that *Garner* evidence, which it viewed as necessarily offered to prove the defendant's propensity to act in a certain way, is subject to Rule 404(c) screening. *Id.* The decision below followed *Garcia*. See *Ferrero*, 2011 WL 1326208, at *4 ¶ 15.

[2] ¶ 11 We agree with *Garcia* and the court of appeals in this case that when the prosecution offers *Garner* evidence to prove the defendant's propensity to commit the charged sexual offense, the evidence must be screened under Rule 404(c). That rule supplants *Garner's* potential exception to the propensity rule. We therefore relegate the term " *Garner* evidence" to shorthand for the type of evidence at issue in that case—"evidence of a prior similar sex offense committed against the same child." *Garner*, 116 Ariz. at 447, 569 P.2d at 1345.

[3] ¶ 12 But we disagree with the court of appeals that " *Garner* evidence" is always subject to Rule 404(c) screening. Rule 404(b) and (c) create a framework for admitting evidence of other crimes, wrongs, or acts that depends in part upon the purpose for which the evidence is offered. As in *Garner*, the State offered other-act evidence here to prove *Ferrero's* propensity (and the jury was so instructed), but that will not always be the case. *Garner* evidence might also be relevant for non-propensity purposes, such as showing motive, intent, identity, or opportunity. If the evidence is

offered for a non-propensity purpose, it may be admissible under Rule 404(b), subject to Rule 402's general relevance test, Rule 403's balancing test, and Rule 105's requirement for limiting instructions in appropriate circumstances. But if evidence of other sex acts is offered in a sexual misconduct case to show a defendant's "aberrant propensity" to commit the charged act, as it was here, Rule 404(c) applies.

¶ 13 Rules 404(b) and (c), however, apply only to evidence of "other" crimes, wrongs, or acts. The admissibility of *Garner* evidence therefore depends on a second question—that is, whether the evidence is so intrinsic to the charged act as not to constitute an "other" act.

B. Intrinsic Evidence

¶ 14 The intrinsic evidence doctrine arose from Rule 404(b)'s distinction between "charged" and "other" crimes, wrongs, or acts. See *State v. Nordstrom*, 200 Ariz. 229, 248 ¶ 56, 25 P.3d 717, 736 (2001); see also *United States v. Bowie*, 232 F.3d 923, 927 (D.C.Cir.2000) (noting that Federal Rule of Evidence 404(b) "creates a dichotomy between crimes or acts that constitute the charged crime and crimes or acts that do not"). Its premise is that certain acts are so closely related to the charged act that they cannot fairly be considered "other" acts, but rather are part of the charged act itself. See *United States v. Green*, 617 F.3d 233, 245 (3d Cir.2010). The doctrine recognizes that excluding evidence of these acts may prevent a witness from explaining the charged act, making the witness's testimony confusing or incoherent. See *Burke v. State*, 624 P.2d 1240, 1250 (Alaska 1980); *People v. Dobek*, 274 Mich.App. 58, 732 N.W.2d 546, 568 (2007). Thus, courts have used the doctrine to admit evidence of other acts as intrinsic to the charged act despite the danger that it might also show the defendant's propensity to act in a certain way. See Fed.R.Evid. 404(b), cmt. to 1991 amd. (citing *United States v. Williams*, 900 F.2d 823 (5th Cir.1990)).

¶ 15 We previously said that "evidence is

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'intrinsic' when [1] evidence of the other act and evidence of the crime charged are 'inextricably intertwined' or [2] both acts are part of a 'single criminal episode' or [3] the other acts were 'necessary preliminaries' to the crime charged." *State v. Andriano*, 215 Ariz. 497, 502 ¶ 18, 161 P.3d 540, 545 (2007) (quoting *State v. Dickens*, 187 Ariz. 1, 18 n. 7, 926 P.2d 468, 485 n. 7 (1996)); see *Nordstrom*, 200 Ariz. at 248 ¶ 56, 25 P.3d at 736 (also quoting *Dickens*). Our opinions in *Andriano* and *Nordstrom* illustrate the narrow scope of this definition.

¶ 16 In *Andriano*, the defendant was convicted of murdering her husband. 215 Ariz. at 502 ¶ 14, 161 P.3d at 545. We held that evidence of Andriano's extramarital affairs and attempts to procure insurance on her *243 **513 husband's life was not intrinsic to the murder because Andriano never actually procured the insurance, *id.* at ¶¶ 20–21, and her affairs were unrelated to the murderous act itself, *id.* at 503 ¶ 26, 161 P.3d at 546.

¶ 17 The connection between the charged and uncharged acts in *Nordstrom* was similarly tenuous. Nordstrom murdered several people in a bar. 200 Ariz. at 236–38 ¶¶ 1–7, 25 P.3d at 724–26. We rejected the State's argument that Nordstrom's solicitation of another person to burglarize the same bar two years earlier was intrinsic to the subsequent murders. *Id.* at 248 ¶ 56, 25 P.3d at 736. We concluded that too much time had passed and the acts were not sufficiently similar. See *id.* Thus, although the acts in *Andriano* and *Nordstrom* shared some similarities or connections to the charged acts, we found that the other acts were not inextricably intertwined with, part of the same criminal episode as, or necessary preliminaries to, the charged acts.

¶ 18 Despite our efforts to narrowly constrain the intrinsic evidence doctrine, some decisions have cited it to justify the admission of evidence that is not truly intrinsic to the charged act. See, e.g., *State v. Herrera*, 226 Ariz. 59, 64 ¶ 15, 243 P.3d 1041, 1046 (App.2011). It has proved difficult for courts to determine when an "other act" is necessarily pre-

liminary to the charged act or when evidence crosses the line from being admissible as "part of a single criminal episode" as the charged act, to being inadmissible as merely arising "out of the same series of transactions as the charged offense." See, e.g., *United States v. Siegel*, 536 F.3d 306, 316 (4th Cir.2008) (applying "same series of transactions" test); *United States v. McLee*, 436 F.3d 751, 760 (7th Cir.2006) (same).

¶ 19 The Third Circuit noted similar problems in identifying whether evidence is sufficiently "inextricably intertwined" to make it intrinsic, remarking that "the [inextricably intertwined] test creates confusion because, quite simply, no one knows what it means." *Green*, 617 F.3d at 246. In *Green*, the defendant was convicted of attempted possession of cocaine. *Id.* at 237–38. At trial, the court admitted evidence of a bomb plot under the theory that the defendant sought to purchase dynamite and cocaine in the same transaction, so the bomb plot helped explain how the defendant attempted to procure the drugs. *Id.* at 237. The Third Circuit found the evidence admissible for non-propensity purposes under Rule 404(b), *id.* at 252, but it disagreed with the trial court's analysis and held that the evidence relating to the bomb plot was not intrinsic to the attempted cocaine possession, *id.* at 249. After extensively analyzing the pitfalls of the intrinsic evidence doctrine generally, and the "inextricably intertwined" category in particular, the court decided to "reserve the 'intrinsic' label for two narrow categories of evidence." *Id.* at 248. According to the court, an "other act" is intrinsic only if it (1) "directly proves the charged offense," or (2) is "performed contemporaneously with" and "facilitate[s] the commission of the charged crime." *Id.* at 248–49 (internal citations and quotation marks omitted).

[4] ¶ 20 Given the difficulty Arizona courts have experienced in applying the intrinsic evidence definition we espoused in *Andriano* and *Nordstrom*, we adopt *Green's* definition. It desirably allows evidence of acts that are so interrelated with the

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charged act that they are part of the charged act itself without improperly admitting evidence that, although possibly helpful to explain the charged act, is more appropriately analyzed under Rule 404(b) or (c). Henceforth, evidence is intrinsic in Arizona if it (1) directly proves the charged act, or (2) is performed contemporaneously with and directly facilitates commission of the charged act.^{FN3} See *id.* at 248–49. The intrinsic evidence doctrine thus may not be invoked merely to “complete the story” or because evidence “arises out of the same transaction or course of events” as the charged act.^{FN4}

FN3. Other jurisdictions have entirely abandoned the intrinsic evidence doctrine. See, e.g., *State v. Fetelee*, 117 Hawai‘i 53, 175 P.3d 709, 737 (2008); *State v. Rose*, 206 N.J. 141, 19 A.3d 985, 1010–11 (2011). Although the need for the doctrine may be questioned, the parties have not asked that we abandon it, so we do not decide that issue today.

FN4. Evidence that “completes the story,” “arises out of the same transaction” as the charged act, or is “part and parcel” of the charged act may well qualify as intrinsic evidence, but those tests are broader than our formulation and should not be invoked to analyze whether evidence is intrinsic to the charged act.

****514 *244** ¶ 21 Although we intend our definition to be narrow, the varied circumstances in which parties may attempt to admit evidence of other acts makes it impossible to fashion a bright-line test for determining when evidence is intrinsic. Under our definition, however, *Garner* evidence is not inherently intrinsic to the charged act. Although prior sexual contact with the victim may be so closely related to the charged sexual offense that it is intrinsic and thus exempt from Rule 404 analysis, it may also be sufficiently remote and unrelated that it neither proves nor facilitates the charged act.

[5] ¶ 22 The nature of intrinsic evidence as part

of the charged act also shows why it is not subject to Rule 404(c) screening. Because Rule 404(c) applies to *other* “crimes, wrongs, or acts,” it does not apply if the proponent offers evidence of the charged act itself. By its language, the rule also does not apply if evidence of uncharged acts is offered to show something other than the defendant’s propensity to commit the charged act. Rule 404(c) thus does not extend to truly intrinsic acts, which are not “other acts” and are not offered to prove the defendant’s propensity to commit the charged act. Accordingly, intrinsic evidence—including *Garner* evidence that is intrinsic—is not subject to Rule 404(c) screening.

¶ 23 Our narrow definition of intrinsic evidence will not unduly preclude relevant evidence of a defendant’s other acts. Non-intrinsic evidence will often be admissible for non-propensity purposes under Rule 404(b). See *Andriano*, 215 Ariz. at 502–03 ¶¶ 22–23, 26–27, 161 P.3d at 545–46 (finding evidence of attempts to procure insurance and extramarital affairs not intrinsic, but nonetheless admissible under Rule 404(b) to show plan, knowledge, motive, and intent to kill). As the court observed in *Green*,

[I]t is unlikely that our holding will exclude much, if any, evidence that is currently admissible as background or “completes the story” evidence under the inextricably intertwined test. We reiterate that the purpose of Rule 404(b) is simply to keep from the jury evidence that the defendant is prone to commit crimes or is otherwise a bad person, implying that the jury needn’t worry overmuch about the strength of the government’s evidence. No other use of prior crimes or other bad acts is forbidden by the rule, and one proper use of such evidence is the need to avoid confusing the jury. Thus, most, if not all, other crimes evidence currently admitted outside the framework of Rule 404(b) as “background” evidence will remain admissible under the approach we adopt today. The only difference is that the proponent will have to provide notice of his inten-

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tion to use the evidence, and identify the specific, non-propensity purpose for which he seeks to introduce it (*i.e.*, allowing the jury to hear the full story of the crime). Additionally, the trial court will be required to give a limiting instruction upon request.

617 F.3d at 249 (citations and internal quotation marks omitted); *see* Ariz. R. Evid. 105 (jury instruction); Ariz. R.Crim. P. 15.1(b)(7) (pretrial notice); *see also* *Bowie*, 232 F.3d at 927 (“So far as we can tell, the only consequence[] of labeling evidence ‘intrinsic’ [is] to relieve ... the court of its obligation to give an appropriate limiting instruction upon defense counsel’s request.”).

[6] ¶ 24 In summary, evidence of the defendant’s prior sexual conduct with the child victim of a sexual offense—*Garner* evidence—is not inherently intrinsic; whether it is depends on its relation to the charged acts. If it is not intrinsic, it may nonetheless be admissible under Rule 404(b) if not offered to prove the defendant’s propensity to commit the charged act, or under Rule 404(c) if offered to prove the defendant’s propensity to commit the charged act and the proponent satisfies Rule 404(c)’s prerequisites.

C. Evidence of Ferrero’s Uncharged Acts

[7] ¶ 25 The court of appeals correctly held that the trial court erred by failing to subject several categories of other act evidence*245 **515 to Rule 404(c) screening because it was offered to show the defendant’s propensity to commit the charged acts. For example, the trial court, presumably relying on *Garner*, permitted the prosecutor to introduce evidence that on the ride to Ferrero’s house on the night of the first charged offense, Ferrero told the victim to pull down the victim’s pants and underwear and expose himself. The victim acceded to Ferrero’s demands because Ferrero threatened to leave him on the side of the road if he did not comply. When they arrived at Ferrero’s house, the victim talked with Ferrero’s mother and played computer games for at least thirty minutes while Ferrero showered. The victim then joined Ferrero in bed, at

which time Ferrero completed the first charged act.

¶ 26 The State offered the exposure evidence to show “that Defendant had the emotional propensity to engage in sexual misconduct” with the victim, and the jury was instructed that the evidence could be used for that purpose. The evidence is facially governed by Rule 404(c) because it involves an uncharged sex act offered “to show that the defendant had a character trait giving rise to an aberrant sexual propensity to commit the offense charged.” The evidence is therefore exempt from Rule 404(c) screening only if the uncharged act was truly intrinsic to the charged act and thus not an “other act.”

¶ 27 The evidence of this uncharged act does not fit within our narrow definition of intrinsic evidence. The two acts were qualitatively different and constituted two separate instances of sexual abuse. Thus, under the first prong of our definition, forcing the victim to expose himself does not directly prove that Ferrero later committed the charged sexual offense. The second prong—which requires that the act occur contemporaneously with and directly facilitate the charged act—is equally unavailing. Although forcing the victim to pull down his pants in the vehicle may have facilitated the charged act by weakening the victim’s defenses, it did not occur contemporaneously with the charged act. The acts were separated by at least thirty minutes, during which time the victim talked to Ferrero’s mother and played computer games.

¶ 28 The forced exposure is therefore not intrinsic to the charged act. Because the evidence was offered to prove the defendant’s propensity to commit the charged act, the trial court erred in admitting evidence of that act without screening it under Rule 404(c).^{FN5}

FN5. Having found the victim’s testimony regarding his forced exposure inadmissible absent Rule 404(c) screening, we need not address the remaining uncharged acts. On remand, however, the State may seek ad-

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mission of the other uncharged acts pursuant to the framework outlined above.

III. CONCLUSION

¶ 29 Although we agree with the court of appeals' result, we disagree with its analysis and therefore vacate its memorandum decision and remand the case for a new trial on the first two counts.^{FN6} If the State seeks to admit evidence of other acts on remand, the trial court must determine whether the evidence is offered to prove Ferrero's propensity. If the evidence is offered for a legitimate non-propensity purpose, the trial court may admit it under Rule 404(b), subject to the other rules of evidence. If, however, the evidence is offered to prove propensity, the trial court must screen it under Rule 404(c).

FN6. By remanding for a new trial with instructions for the trial court to consider whether the evidence was intrinsic to the charged acts, the court of appeals implicitly found that the trial court's failure to screen the evidence of other acts under Rule 404(c) was not harmless error. In its petition for review, the State challenged the court of appeals' refusal to conduct an explicit harmless error analysis, but we did not grant review on that issue.

CONCURRING: ANDREW D. HURWITZ, Vice Chief Justice, W. SCOTT BALES, A. JOHN PELANDER and ROBERT M. BRUTINEL, Justices.

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Only the Westlaw citation is currently available. 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

Court of Appeals of Arizona,
 Division 2, Department B.
 The STATE of Arizona, Respondent,
 v.
 Edward Terrazas VILLA, Petitioner.

No. 2 CA-CR 2013-0153-PR.
 Aug. 27, 2013.

Petition for Review from the Superior Court of Pima County; Cause No. CR20083740; Honorable James E. Marner, Judge. REVIEW GRANTED; RELIEF DENIED.

Scott W. Schlievert, Tucson, Attorney for Petitioner.

MEMORANDUM DECISION

ESPINOSA, Judge.

*1 ¶ 1 Following a jury trial, petitioner Edward Villa was convicted of first-degree murder, third-degree burglary, and unlawful use of a means of transportation. The trial court imposed a term of life imprisonment for the murder and presumptive terms of 2.5 and 1.5 years' imprisonment for the other charges. We affirmed Villa's convictions and sentences on appeal. *State v. Villa*, No. 2 CA-CR 2009-0372 (memorandum decision filed Feb. 9, 2011). In 2012, Villa filed a petition for post-conviction relief pursuant to Rule 32, Ariz. R.Crim. P., claiming that *State v. Ferrero*, 229 Ariz. 239, ¶¶ 7 & 14 - 24, 274 P. 3d 509, 511 & 512 - 14 (2012) (clarifying definition of intrinsic evidence, and addressing when Rule 404(b), Ariz. R. Evid., applies to such evidence), constitutes a significant change in the law that applies to his case and would

probably overturn his conviction or sentence. See Ariz. R.Crim. P. 32.1(g). He now seeks review of the court's summary denial of that petition. We will not disturb that ruling unless the court clearly has abused its discretion. See *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App.2007). We find no such abuse here.

¶ 2 On appeal, Villa challenged the trial court's rejection of his claim that the items belonging to the victim found in a storage locker he had rented constituted other-act evidence inadmissible under Rule 404(b), Ariz. R. Evid. *Villa*, No. 2 CA-CR 2009-0372, ¶ 31. Finding the state had not proffered the evidence from the storage locker as evidence of "[o]ther crimes, wrongs or acts" under Rule 404(b), we concluded Villa's possession of the victim's property had been properly admitted as relevant evidence of murder. *Id.* ¶¶ 32, 34. In denying his petition for post-conviction relief below, the court thus found that, absent a significant change in the law, Villa was precluded from raising his claim. See Ariz. R.Crim. P. 32.2(a)(2) (defendant precluded from relief based on any ground that has been "[f]inally adjudicated on the merits on appeal"); 32.2(b) (excepting from rule of preclusion claims raised under Rule 32.1(d), (e), (f), (g), and (h)).

¶ 3 The trial court further concluded that *Ferrero* did not apply retroactively to Villa's case, not only because his case was final when *Ferrero* was issued, but because our supreme court expressly intended its ruling in *Ferrero* to apply "[h]enceforth." *Ferrero*, 229 Ariz. 239, ¶ 20, 274 P. 3d at 243. Finally, the court concluded that even if *Ferrero* did apply retroactively, "it would not accord Defendant relief. [At trial t]he ... court noted that the evidence was admissible not as 'other acts', but to show motive for the murder and the Court of Appeals upheld the trial court's ruling."

¶ 4 On review, Villa contends the trial court "erroneously admitted evidence of other facts

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[items belonging to the victim found in the storage locker] ... that were neither relevant nor properly disclosed under Ariz. R. Evid. 404 ([b]).” Villa further asserts that he cited “the *Ferrero* case ... in his Rule 32 Petition ... and that argument is incorporated herein.” Maintaining he “definitely believes that [the admission of the items belonging to the victim that were found in the storage locker] was such a significant evidentiary issue in the trial that this Rule 32 did present a ‘colorable claim,’ “ Villa argues he is entitled to an evidentiary hearing.

*2 ¶ 5 However, other than obliquely suggesting that the trial court “should be able to use the *Ferrero* analysis in reviewing the evidence in this homicide case,” Villa utterly fails to explain why *Ferrero* constitutes a significant change in the law that applies to his case or why the trial court erred by finding his claim precluded in the first instance. Instead, Villa essentially asserts, as he did on appeal, that the challenged evidence was not relevant, a claim that plainly is precluded. *See* Ariz. R.Crim. P. 32.2(a)(2).

¶ 6 Accordingly, although review is granted, relief is denied.

CONCURRING: VIRGINIA C. KELLY, Presiding Judge and PETER J. ECKERSTROM, Judge.

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