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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. ANDREA MARGARITA TAPIA, Appellant.	)	2 CA-CR 2011-0156 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20102891001

Honorable Jane L. Eikleberry, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Diane Leigh Hunt
Tucson
Attorneys for Appellee

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

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

¶1 Andrea Tapia was convicted after a jury trial of criminal damage in an amount above $2,000 but less than $10,000. The trial court suspended the imposition of sentence and placed her on three years' probation, including as a condition that she spend sixty days in jail. Tapia argues on appeal that the sole evidence showing the amount of damage exceeded $2,000 was inadmissible hearsay, constituting fundamental error. She additionally contends the court erred in calculating restitution.[1] We affirm.

¶2 In August 2010, Tapia borrowed a 2010 Chevrolet Camaro her friend, G., had rented from a rental agency. While driving, she lost control of the Camaro, striking a guard rail and becoming stuck on a curb. A witness called 9-1-1 and took photographs of the damaged Camaro. Tapia left before police officers arrived, but was arrested approximately two hours later, and breath tests showed her blood alcohol concentration (BAC) to be .281 and .268. The state charged her with aggravated driving under the influence, aggravated driving with a BAC of .08 or greater, and criminal damage more than $2,000 but less than $10,000. The jury acquitted her of the aggravated driving charges but found her guilty of criminal damage, and she was sentenced as described above.

¶3 On appeal, Tapia asserts that the only evidence proving the monetary amount of damage to the Camaro was testimony by the rental agency's vehicle repair manager describing a repair estimate of $12,245.65 received from a "contract shop," and

[1]In her opening brief, Tapia also asserted the trial court erred in imposing a twenty-dollar time-payment fee. She withdrew that argument in her reply brief, agreeing with the state that the time-payment fee was authorized pursuant to A.R.S. § 12-116(A) based on the restitution award. Accordingly, we do not address this argument.

that this testimony was inadmissible hearsay. "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted," and generally is inadmissible. Ariz. R. Evid. 801(c), 802.[2] But Tapia did not object to this testimony and, thus, is precluded from obtaining appellate relief absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). Fundamental error is "'error going to the foundation of the case, error that takes from the defendant a right essential to his defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Id.* ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). Such error must be "'clear, egregious, and curable only via a new trial.'" *State v. Bible*, 175 Ariz. 549, 572, 858 P.2d 1152, 1175 (1993), *quoting State v. Gendron*, 168 Ariz. 153, 155, 812 P.2d 626, 628 (1991).

¶4 Generally, hearsay admitted without objection "becomes competent evidence admissible for all purposes." *State v. McGann*, 132 Ariz. 296, 299, 645 P.2d 811, 814 (1982). But, "[w]hen hearsay evidence is the sole proof of an essential element of the state's case, reversal of the conviction may be warranted." *Id.*; *see also State v. Allen*, 157 Ariz. 165, 171, 755 P.2d 1153, 1159 (1988) (admission of hearsay that is "the only evidence of the details of the crime" constitutes fundamental error). But, even if the repair estimate relied upon by the vehicle repair manager was inadmissible hearsay, we

[2]We cite the version of the evidentiary rules in effect during Tapia's March 2011 trial. None have undergone substantive changes. *See* Ariz. R. Evid. prefatory cmt. to 2012 amendments.

agree with the state there was other evidence sufficient to support the jury's finding that Tapia had caused more than $2,000 in damage to the Camaro.

¶5 G. testified he had paid over $10,000 to the rental agency for damage to the Camaro and the agency had sent him a receipt stating he owed them $16,200. Tapia asserts, however, that the amounts G. had paid were based on the same repair estimate and thus were also inadmissible hearsay. But, even assuming G.'s testimony about the amount listed on the receipt constituted inadmissible hearsay, his testimony that he had made the payments was not hearsay. A jury reasonably could conclude the rental agency would not require payments exceeding $10,000 if the damage to the Camaro had been less than $2,000. *See State v. Printz*, 125 Ariz. 300, 304, 609 P.2d 570, 574 (1980) (when determining value, jury may use common sense); *State v. Brockell*, 187 Ariz. 226, 228, 928 P.2d 650, 652 (App. 1996) (damage "determined by applying a rule of reasonableness to the particular fact situation presented").

¶6 Moreover, photographs of the damaged Camaro further support a conclusion the damage far exceeded $2,000. The photographs showed extensive damage, including that the Camaro's right front panel and driver's side door were severely dented and that the front bumper had been torn free. The vehicle repair manager testified the repair estimate was consistent with the damage shown in those photographs. Thus, any error in permitting the repair manager to describe the repair estimate was not

fundamental.[3] *See Allen*, 157 Ariz. at 171-72, 755 P.2d at 1159-60; *McGann*, 132 Ariz. at 299, 645 P.2d at 814.

¶7 At sentencing, the trial court ordered that Tapia pay G. $1,500 as restitution for attorney fees G. had incurred in negotiating the amount he owed the rental agency for the damage to the Camaro. Tapia asserts on appeal that, because the attorney succeeded in reducing the amount G. owed only by $250, the $1,500 in attorney fees was unreasonable. Tapia did not raise this argument below and, accordingly, we review only for fundamental, prejudicial error.[4] *Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607-08. But Tapia cites no authority, and we find none, suggesting that merely because an attorney was relatively unsuccessful, the fee that attorney charged is unreasonable as a matter of law. Nor does Tapia provide any basis for us to adopt such a rule. We

[3]Even if the repair estimate was the only evidence showing the monetary amount of damage to the Camaro, reversal of her conviction still would not be warranted. In all reasonable likelihood, the repair estimate is a business record of the rental agency or the business that provided the estimate and thus would be admissible pursuant to Rule 803(6), Ariz. R. Evid. *See Air Land Forwarders, Inc. v. United States*, 172 F.3d 1338, 1342 (Fed. Cir. 1999) ("[A] document prepared by a third party is properly admitted [pursuant to Rule 803(6), Fed. R. Evid.,] as part of the business entity's records if the business integrated the document into its records and relied upon it."). At most, at a new trial, the state would be required to provide additional foundation supporting the admission of the repair estimate. We need not reverse when the error would be cured so readily at a new trial. *See State v. Moody*, 208 Ariz. 424, ¶ 122, 94 P.3d 1119, 1150 (2004).

[4]In her reply brief, Tapia asserts that fundamental error review is not required because "once a sentence is pronounced, there is no opportunity to make a further record," relying on *State v. Vermuele*, 226 Ariz. 399, 249 P.3d 1099 (App. 2011). *Vermuele* does not apply here; Tapia had ample opportunity to raise this argument below. Before the trial court imposed Tapia's sentence, the parties discussed both the possibility of including attorney fees in the restitution award and the amount of those fees, and Tapia did not assert the amount of fees was unreasonable.

therefore do not address her argument further. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (opening brief must include "[a]n argument which shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived when argument insufficient to permit appellate review).

¶8 Tapia's conviction and probationary term are affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

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

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge