IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ELIAS PETE OCHOA, Appellant.	2 CA-CR 2010-0260 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093423001

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and David A. Sullivan
Tucson
Attorneys for Appellee

Isabel G. Garcia, Pima County Legal Defender
By Scott A. Martin
Tucson
Attorneys for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Elias Ochoa was convicted of aggravated assault with a deadly weapon or dangerous instrument, a dangerous-nature and domestic violence offense. The trial court sentenced him to a mitigated prison term of five years. On appeal, Ochoa argues the court erred by admitting testimony under the excited utterance exception to the hearsay rule, contending the declarant's excitement had not been caused by a recent startling event. Because the court did not abuse its discretion, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008). Ochoa and his sister, G., were drinking together, when they began to argue and fight physically. Ochoa returned to his mother's house, followed by G., where they continued to fight. Ochoa's mother separated the two, at which point Ochoa got a knife out of the kitchen. Then Ochoa either stabbed G. in the back of the head with the knife or "threw a knife at her, striking her in the head." Ochoa was convicted and sentenced as stated above and appealed.

Discussion

¶3 Ochoa argues the trial court erred by admitting an officer's testimony that G. had stated "her brother threw a knife at her, striking her in the head."[1] He contends

[1]Ochoa argues for the first time in his reply brief that G.'s statement should not have been admitted because she "gave two different versions of how her head had been injured" and, thus, was unreliable. "An argument first raised on appeal in the reply brief

the statement was not an excited utterance under Rule 803(2), Ariz. R. Evid., because G.'s "agitated condition" was not caused by her brother throwing the knife or stabbing her with it but rather by her earlier intoxication and altercations. "We review a trial court's ruling on the admissibility of hearsay evidence for an abuse of discretion." *State v. Bronsen*, 204 Ariz. 321, ¶ 14, 63 P.3d 1058, 1061 (App. 2003).

¶4 Rule 803(2) allows for the admission of an excited utterance as a hearsay exception if: 1) there is a startling event; 2) the statement is made soon after the event; and 3) the statement relates to the event. *State v. Bass*, 198 Ariz. 571, ¶ 20, 12 P.3d 796, 802 (2000). The declarant's excitement also must be caused by the startling event. *Id.* ¶ 23. In *State v. Carr*, 154 Ariz. 468, 469-70, 743 P.2d 1386, 1387-88 (1987), a witness testified about a statement by another witness that the defendant had said he was going to kill the victim after a verbal altercation with the victim from a balcony, but before going downstairs to find him. The court reasoned that the "startling event began with the sudden eruption of a loud confrontation . . . [and] was still in progress a few minutes later when a statement about it was made by a witness who was desperately trying to staunch [the victim's knife wound]." *Carr*, 154 Ariz. at 470, 743 P.2d at 1388.

¶5 G. testified she had been upset when she returned to her mother's house before she and Ochoa continued to fight. And, the officer testified that the bathroom curtain rod was pulled down and blood was "spewed all over the walls." He further testified that after Ochoa had injured G. with the knife she had a "pretty good laceration

---

is waived, and we will not address it." *State v. Edmisten*, 220 Ariz. 517, n.2, 207 P.3d 770, 775 n.2 (App. 2009).

in the back of her head" and blood on her shirt. Finally he testified that she had been "very distraught and crying," and that he had "tried to calm her down." Here, the startling event may have begun when Ochoa and G. first fought, but it continued until after Ochoa injured G. and she made her statement. The fact G. was excited during the entire incident does not negate her also being excited by Ochoa's stabbing her or throwing a knife at her. *See Carr*, 154 Ariz. at 470, 743 P.2d at 1388. The trial court properly could have found that her injury was independently startling.

¶6 Ochoa relies on *Bass*, 198 Ariz. 571, 12 P.3d 796; *State v. Thompson*, 169 Ariz. 471, 820 P.2d 335 (App. 1991); and *State v. Rivera*, 139 Ariz. 409, 678 P.2d 1373 (1984), to argue G.'s excitement was not caused by the knife injury. But all three cases are distinguishable. In *Bass*, a witness testified to other witnesses' statements regarding the defendant's reckless driving before a severe car accident. 198 Ariz. 571, ¶¶ 22-23, 12 P.3d at 802-03. In that case, the statements concerned events which had occurred prior to the startling event and which were not shown to be independently startling, *id.* ¶ 24, whereas here, G.'s statements described one aspect of the startling event, which was also independently startling. In both *Thompson* and *Rivera*, the declarants returned to their normal behavior for some time after being molested and before making their statements. *Thompson*, 169 Ariz. at 474, 820 P.2d at 338; *Rivera*, 139 Ariz. at 412, 678 P.2d at 1376. Here, the officer described G. as very upset just before she made her statements and no evidence suggests she had become calm between being injured and making the statements. Thus, *Bass*, *Thompson*, and *Rivera* are inapposite and the trial court did not abuse its discretion in admitting G.'s statement as an excited utterance.

¶7 In his reply brief, Ochoa contends the state's "assertion of fact that Appellant 'stabbed G. in the back of her head' is not supported by the record," noting the state relies on its impeachment of G. with her prior inconsistent statement that Ochoa had stabbed her. He argues G.'s prior inconsistent statement should not have been considered as substantive evidence, relying on *State v. Allred*, 134 Ariz. 274, 655 P.2d 1326 (1982). But, in his opening brief, Ochoa only argued that the officer's testimony about the statement should not have been admitted because G.'s statement was not an excited utterance. The prior inconsistent statement argument involves a different witness. And the excited utterance exception and the prior inconsistent statement exception to the hearsay rule are based on different rationales with the excited utterance having "indicia of reliability" not found in inconsistent statements. *See Carr*, 154 Ariz. at 471-72, 743 P.2d at 1389-90. Because Ochoa did not challenge the impeachment evidence in his opening brief, he has waived this argument.[2] *See State v. Edmisten*, 220 Ariz. 517, n.2, 207 P.3d 770, 775 n.2 (App. 2009) ("An argument first raised on appeal in the reply brief is waived, and we will not address it.").

[2]Furthermore, to the extent Ochoa may be arguing insufficient evidence supports the verdict, we do not agree. *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it).

Conclusion

¶8 For the foregoing reasons, we affirm Ochoa's conviction and sentence.

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

CONCURRING:

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

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