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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STATE OF ARIZONA, Appellee, v. EDWARD VALENZUELA GAMEZ, Appellant.	2 CA-CR 2010-0211 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20090916001

Honorable Deborah Bernini, Judge

AFFIRMED

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson — Tucson
Attorneys for Appellee

Robert H. Backus — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, appellant Edward Gamez was convicted of attempted aggravated assault, domestic violence, and sentenced to an eight-year prison term. On

appeal, Gamez argues the trial court erred by limiting the scope of his cross-examination of state witnesses and by not sua sponte instructing the jury on the defense of renunciation. Finding no error, we affirm.

Factual Background and Procedural History

¶2 "'We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant.'" *State v. Wassenaar*, 215 Ariz. 565, ¶ 2, 161 P.3d 608, 612 (App. 2007), *quoting State v. Greene*, 192 Ariz. 431, ¶ 12, 967 P.2d 106, 111 (1998). In February 2009, Gamez and R. were in a romantic relationship and had a five- to six-month-old child together. The night of February 24, they had a "verbal argument" at R.'s home during which R. injured her hand. She went to the hospital emergency room for treatment and returned home early the following morning.

¶3 R.'s mother, Debra, apparently spent the night at R.'s home, and R.'s friend, Cindy, arrived shortly after R. had gone to bed. Debra told Cindy about R.'s injury, and Cindy and Debra went into R.'s bedroom and, with her permission, took the baby into the living room. Gamez objected to Cindy watching the baby, and he and R. began to argue. Eventually, R. left the bedroom, borrowed Cindy's telephone, walked outside the house, and called the police to "have [Gamez] removed." Gamez stayed inside for a short time and then went outside carrying R.'s handgun. As he passed Debra and Cindy, who were still in the house, he said, "I'm going to blast that bitch."

¶4 Once outside, Gamez pointed the gun at R., who was on the telephone with the police and was facing away from him. She turned, saw the gun, and ran. Gamez then "stashed the gun . . . down low and . . . ran across the street" to his cousin's house. When R. returned home, the police had arrived. Investigators later found R.'s gun partially hidden in a boxing glove outside the house where Gamez's cousin lived.

¶5 A jury acquitted Gamez of aggravated assault but found him guilty of the lesser-included offense of attempted aggravated assault, domestic violence. He was acquitted of disorderly-conduct charges relating to Debra and Cindy. The trial court sentenced him as outlined above, and he now appeals.[1] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Limitation of Cross-Examination

¶6 Gamez first argues the trial court "prevented him from effectively confronting the witnesses and from presenting a theory of defense" by limiting cross-examination to exclude evidence about the cause of the fight that had occurred the night before the incident. Arizona allows "a broad scope of cross-examination, the unreasonable limitation of which will normally result in a reversal." *State v. Bracy*, 145 Ariz. 520, 533, 703 P.2d 464, 477 (1985). But we "'will not reverse the [trial] court's

[1]Although irrelevant to the issues raised in this appeal, Gamez also was convicted of possession of a deadly weapon by a prohibited possessor, a charge that had been severed from the other counts before trial and to which he pleaded guilty. The trial court sentenced him to a three-year prison term, to be served concurrently with the prison term imposed for the attempted aggravated assault.

rulings on issues of the relevance and admissibility of evidence absent a clear abuse of its considerable discretion.'" *State v. Davis*, 205 Ariz. 174, ¶ 23, 68 P.3d 127, 131 (App. 2002), *quoting State v. Alatorre*, 191 Ariz. 208, 211, 953 P.2d 1261, 1264 (App. 1998) (alteration in *Davis*).

¶7 Before trial, the court limited the scope of cross-examination to preclude Gamez from eliciting evidence that the previous night's fight allegedly had started when R. had asked him to illicitly obtain prescription drugs for her and Gamez encouraged her to seek treatment for her alleged abuse of prescription drugs. The court, however, did permit Gamez to demonstrate, if he could, that R. was "under the influence of any sort of drug on the relevant date."

¶8 The trial court did not abuse its discretion in limiting the scope of cross-examination. Any evidence that R. had taken drugs on the day of the incident and was under the influence of such drugs at the time of the offense was relevant because it might have affected her ability to perceive or recall the incident. *See State v. Walton*, 159 Ariz. 571, 581-82, 769 P.2d 1017, 1027-28 (Ariz. 1989) (drug use might affect witness's ability to accurately perceive and remember). It was thus a proper subject for cross-examination. In contrast, Gamez has not demonstrated how evidence of R.'s alleged past drug use would have affected her credibility or otherwise would have been admissible. *See id.* (history of drug use properly excluded where defendant did not offer to prove how it impaired witness's memory and perception).

¶9 Moreover, contrary to Gamez's argument, evidence about why the two had argued the night before the incident that resulted in the charges was unnecessary to demonstrate R.'s "bias" because her testimony that she and Gamez had argued and yelled at one another and that she had been upset provided the jury with "sufficient information to assess [her] bias and motives." *Bracy*, 145 Ariz. at 533, 703 P.2d at 477. Nor did the limitation violate Gamez's constitutional right to confrontation or to present a theory of defense given that these rights are "limited to evidence which is relevant and not unduly prejudicial." *State v. Oliver*, 158 Ariz. 22, 30, 760 P.2d 1071, 1079 (1988). As noted above, the evidence was properly excluded, and Gamez's constitutional rights therefore were not violated. *See Davis*, 205 Ariz. 174, ¶ 33, 68 P.3d at 132. Accordingly, the trial court did not abuse its discretion in limiting the scope of cross-examination.

Jury Instruction

¶10 Gamez also contends the trial court erred by failing to instruct the jury on the defense of renunciation. *See* A.R.S. § 13-1005. As the state points out, he did not request such an instruction at trial. Gamez therefore has forfeited the right to relief for all but fundamental, prejudicial error. Ariz. R. Crim. P. 21.3(c); *State v. Whittle*, 156 Ariz. 405, 407, 752 P.2d 494, 496 (1988); *see also State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). Because Gamez does not argue the alleged error was fundamental, however, and because we see no error that can be so characterized, the argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error waived on appeal); *State v. Fernandez*, 216 Ariz.

545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if apparent).

Disposition

¶11 For the foregoing reasons, Gamez's conviction and sentence are affirmed.

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

CONCURRING:

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

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