DIVISION ONE
FILED: 04/30/2013
RUTH A. WILLINGHAM, CLERK
BY: GH

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 11-0421
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
KEYHAN TABAK,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2010-121206-001SE

The Honorable Samuel A. Thumma, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Joseph T. Maziarz
Criminal Appeals/Capital Litigation Section
and Matthew Binford, Assistant Attorney General
Attorneys for Appellee

The Nolan Law Firm P.L.L.C. — Phoenix
By Cari McConeghy Nolan
Attorneys for Appellant

G E M M I L L, Judge

¶1 Keyhan Tabak appeals from his convictions and sentences for two counts of aggravated assault. For the reasons that follow, we affirm his convictions and sentences.

BACKGROUND

¶2 We view the evidence in the light most favorable to sustaining the convictions and resolve all reasonable inferences against the Defendant. *State v. Manzanedo*, 210 Ariz. 292, 293, ¶ 3, 110 P.3d 1026, 1027 (App. 2005).

¶3 Around 11:00 p.m. on April 21, 2010, Tabak chased the victim on foot outside a restaurant in Mesa. As the victim ran into the restaurant, Tabak shot at him with a handgun and missed. Tabak ran from the scene.

¶4 Witnesses EM and her boyfriend CD were preparing to leave the restaurant's parking lot when Tabak fired the shot. As Tabak fled, the couple followed him, and CD called 9-1-1. BH, a patron at the restaurant, heard the shot and followed Tabak on foot. Mesa Police quickly apprehended Tabak nearby and promptly conducted one-on-one identification procedures with the three witnesses. The witnesses identified Tabak as the shooter. The gun used in the shooting was never located, but Tabak stipulated at trial that gunshot residue was found on his hands after the shooting. Other specific details of the shooting and ensuing investigation are discussed below in the context of the issues raised on appeal.

¶5 The State charged Tabak with two counts of aggravated assault, both class three dangerous felonies. Count 1 was based on Tabak allegedly pointing the gun at the victim while he

chased him outside the restaurant. Count 2 was based on firing the gun at the victim. Both incidents were alleged to have intentionally put the victim in reasonable apprehension of imminent physical injury in violation of Arizona Revised Statutes ("A.R.S.") section 13-1203(A)(2) (2010).[1] The assault charges were aggravated based on Tabak's alleged used of a firearm. *See* A.R.S. § 13-1204(A)(2) (Supp. 2012). The State also alleged both counts were dangerous offenses because they involved the discharge, use, or threatening exhibition of a firearm. *See* A.R.S. § 13-105(13), (15) (Supp. 2012).

¶6 The jury found Tabak guilty as charged on both counts. Tabak waived his right to a jury trial on the State's alleged aggravating circumstances. Based on the evidence, the court found the State proved beyond a reasonable doubt that the offenses involved the infliction or threatened infliction of serious physical injury. *See* A.R.S. § 13-701(D)(1) (Supp. 2012). The court also found the State proved the non-statutory aggravating factor that Tabak evaded police and attempted to cover up the crime. On the other hand, the court found Tabak's "social history" and childhood were mitigating circumstances. The court imposed concurrent, slightly aggravated, terms of twelve years' imprisonment for both counts.

[1] We cite the current version of statutes when no material revisions have occurred since the events in question.

¶7 Tabak timely appealed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010) and 13-4033(A) (2010).

DISCUSSION

¶8 On appeal, Tabak argues that (1) the trial court erred in admitting hearsay evidence; (2) the prosecutor committed misconduct that resulted in an unfair trial; (3) the "show-up procedure" was unduly suggestive; (4) the court erred in allowing the State to present expert testimony regarding identification; (5) the court erred in denying Tabak's motion for acquittal; and (6) the court erred at sentencing in considering an improper aggravating circumstance.

I. Hearsay Evidence

¶9 Tabak points to three instances during EM's testimony where the court purportedly erred in allowing hearsay statements into evidence. First, he challenges the following testimony by EM regarding a shell casing that police found at the scene of the shooting:

> Prosecutor: [W]hen you saw the man on Guadalupe and then you saw the police take him into custody, what was the next thing you did?
>
> EM: Went back. They had him on the corner and then they had officers at the restaurant so we went back there.
>
> Prosecutor: To the [restaurant]?

EM: Uh-huh. Then I parked in the same spot, and it turned out that the shell casing was under my car.

Prosecutor: At that point was it under your car or was it near the car or?

EM: It was under.

Prosecutor: I'm going to show you Exhibit 1 again. Does that look at all familiar to you?

EM: Is that [the] casing?

Prosecutor: Does that look like it could be the casing to you?

EM: I don't know. I just know that they wouldn't let me leave because they said that it was under my car.

Prosecutor: So you just assumed at that point that the bullet was right under your car?

EM: That's what they told me. They told me they found it under my – -

Prosecutor: Is it possible that it was found over there?

Defense counsel: Objection. Lack of foundation.

The Court: I'll sustain the objection.

Prosecutor: Do [sic] you actually ever go look at the casing, touch the casing?

EM: No. I don't know anything about guns. I didn't even think about a casing.

¶10 We review only for fundamental error because Tabak failed to object to the line of questioning on hearsay grounds.

See State v. Velazquez, 216 Ariz. 300, 309-10, ¶ 37, 166 P.3d 91, 100-01 (2007); *see also State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). A proper objection requires "stating the specific ground of objection, if the specific ground was not apparent from the context." *State v. Lopez*, 217 Ariz. 433, 434-35, ¶ 4, 175 P.3d 682, 683-84 (App. 2008) (quoting Ariz. R. Evid. 103(a)(1)). A general objection or an objection on a ground other than the one asserted to the appellate court does not preserve the issue for appeal. *Id.*

¶11 To obtain relief under fundamental error review, Tabak has the burden to show that error occurred, the error was fundamental and that he was prejudiced thereby. *See Henderson*, 210 Ariz. at 567-68, ¶¶ 20-22, 115 P.3d at 607-08. Fundamental error is error that "goes to the foundation of [a defendant's] case, takes away a right that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id*. at 568, ¶ 24, 115 P.3d at 608. The showing required to establish prejudice "differs from case to case[,]" *Id.* at ¶ 26, but prejudice must be shown in the record and may not be based solely on speculation. *State v. Munninger*, 213 Ariz. 393, 397, ¶ 14, 142 P.3d 701, 705 (App. 2006).

¶12 The trial court did not err, fundamentally or otherwise, in permitting the testimony regarding the shell

casing because the testimony was not hearsay.[2] "Hearsay is "a statement . . . offeres in evidence to prove the truth of the matter asserted" and generally is not admissible as evidence. Ariz. R. Evid. 801(c), 802. Here, the testimony was not in evidence to prove the precise location of the shell casing. Rather, the questioning was in response to EM's initial off-hand comment that the casing "turned out" to be under her car, a fact that was contrary to photographs of the scene already in evidence indicating the casing was behind the car. Moreover, even if the court erred in allowing the line of questioning, we fail to see how the error rises to the level of fundamental error. That is, this testimony did not go to the foundation of the case, take away an essential right of Tabak's, or deprive him of a fair trial. *See Henderson*, 210 Ariz. at 568, ¶ 24, 115 P.3d at 608. Also, in light of Tabak's concession at trial that "there was a gun at the scene" and Officer Wiltrout's testimony that shell casings "shoot all over the place" after a gunshot, Tabak cannot meet his burden to show that EM's testimony

[2] As non-hearsay, admission of the testimony into evidence did not implicate Defendant's confrontation rights under the Sixth Amendment. *See Crawford v. Washington*, 541 U.S. 36, 53, 59, n.9 (2004) (emphasizing that the Sixth Amendment is primarily "concerned with testimonial hearsay," and noting "[t]he Clause also does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted"); *State v. Tucker*, 215 Ariz. 298, 315, ¶ 61, 160 P.3d 177, 194 (2007) (testimony that is not admitted to prove its truth is not hearsay and does not violate the Confrontation Clause).

prejudiced him.

¶13 Tabak next refers to EM's testimony after she refreshed her recollection by silently reading a police report containing the written statement she gave to officers the night of the shooting. EM testified that what she had just described at trial regarding the incident mirrored her written statement. Tabak argues this testimony was "improper hearsay evidence," "impermissible vouching" and "bolstering testimony."

¶14 Because Tabak did not object to the testimony at trial, our review is limited to evaluating whether fundamental error occurred. Even if admission of the testimony was error, it did not go to the foundation of Tabak's case, take away a right essential to his defense, nor was it of such magnitude that his trial was unfair. *See Henderson,* 210 Ariz. at 568, ¶ 24, 115 P.3d at 608. Tabak fails to affirmatively show how the "bolstering" testimony prejudiced him in light of the eyewitness testimony and other incriminating evidence at trial.

¶15 Third, and finally, Tabak argues that it was improper for the prosecutor to allow EM to refresh her memory by reviewing a police report. Tabak references a section of the trial where the prosecutor questioned EM as to her verbal statement to the police officers at the scene. After reviewing the transcripts, we discern no error on the use of the police report to refresh EM's memory.

¶16 Once it is established that a witness's memory has failed, Rule 612 permits the "use [of] a writing to refresh memory for the purpose of testifying." *State v. Ortega,* 220 Ariz. 320, 330, ¶33, 206 P.3d 769, 779 (App. 2008). Because under Rule 612 the writing is neither read in evidence nor admitted as an exhibit, "[a]ll that is necessary is that it appears that the writing or object serves to revive the independent recollection of the witness." *State v. Hall,* 18 Ariz. App. 593, 596, 504 P.2d 534, 537 (1972). A witness may refresh her recollection with any document regardless of how or by whom it was created. *Kinsey v. State,* 49 Ariz. 201, 214, 65 P.2d 1141, 1147 (1937).

¶17 Although EM did not testify explicitly that her memory failed regarding her verbal statement to the police, she could only remember giving answers to "general questions." EM agreed that looking at the police report might refresh her memory as to her verbal statement. After reviewing the statement she testified that it did refresh her memory. Afterward she testified, not as to contents of the report, but to her own recollection of the events. Accordingly, we conclude the trial court did not err in allowing the use of the police report to refresh EM's recollection.

¶18 Tabak also complains here that as a result of reviewing the police report, EM's testimony was "inadmissible

double hearsay." Tabak, however, does not clearly articulate what testimony he objects to as being erroneously admitted on hearsay grounds. Without testimonial evidence to evaluate, we cannot properly conduct fundamental error review. We therefore find no abuse of discretion by the court in regard to the admission of this evidence.

II. Prosecutorial Misconduct

¶19 Officer Russell testified, over hearsay objection, that he interviewed CD, and CD wrote in his statement that his positive identification of Tabak as the shooter was "guaranteed." Officer Russell also testified that CD said he observed what appeared to be one male chasing another and CD "definitely saw a black handgun." Tabak argues the prosecutor, by eliciting the responses from Officer Russell, engaged in misconduct warranting reversal. He contends the testimony amounted to improper "vouching." Tabak also appears to argue Officer Russell's testimony was inadmissible hearsay, and therefore, the prosecutor engaged in misconduct by presenting this testimony.

¶20 We review for fundamental error because Tabak did not object at trial to the prosecutor's questions on the basis of prosecutorial misconduct. *See Lopez,* 217 at 434-35, ¶ 4, 175 P.3d at 683-84 (noting that an objection on another ground does not preserve issue for appeal). To gain relief, Tabak must

prove error occurred, the error was fundamental, and he was prejudiced by the error. *Henderson,* 210 Ariz. at 568, ¶¶ 23-26, 115 P.3d at 608.

¶21 "A defendant seeking reversal of a conviction for prosecutorial misconduct must establish that (1) misconduct is indeed present; and (2) a reasonable likelihood exists that the misconduct could have affected the jury's verdict, thereby denying [the] defendant a fair trial." *State v. Dixon*, 226 Ariz. 545, 549, ¶ 7, 250 P.3d 1174, 1178 (2011) (internal citation omitted and quotations omitted). In addition, reversal is only required if misconduct is "so pronounced and persistent that it permeates the entire atmosphere of the trial." *State v. Hughes,* 193 Ariz. 72, 79, ¶ 26, 969 P.2d 1184, 1191 (1998) (quotation omitted).

¶22 Tabak does not point to anything in the record indicating the prosecutor intentionally engaged in improper conduct. Tabak does not identify any comments made by the prosecutor that improperly bolsters a witness; instead, the challenge is only to a particular line of questioning. In asking Officer Russell about his conversation, the prosecutor neither placed the prestige of the government behind the officer's testimony nor suggested the existence of additional evidence not presented to the jury. *See State v. Doerr,* 193 Ariz. 56, 62, ¶ 24, 969 P.2d 1168, 1174 (1998). We are not

persuaded that Tabak was prejudiced by the questioning. Although CD did not identify Tabak in court, CD testified that he was sure he identified the right person at the scene of the crime when police presented Tabak to the witnesses. Furthermore, even if Officer Russell's statements regarding CD were hearsay, the questioning of Officer Russell was not "so egregious" as to deprive Tabak of a fair trial. *See State v. Hernandez*, 170 Ariz. 301, 307, 823 P.2d 1309, 1315 (App. 1991). We cannot say the prosecutor's questioning in this case rose to the level of fundamental, prejudicial error necessary to reverse Tabak's convictions.

III. Show-Up Procedure

¶23 Tabak argues that the "show-up" identification procedures used by the police the night of the incident were unduly suggestive and therefore violated his due process rights. Tabak did not raise this argument at trial. Therefore, we normally review for fundamental error. Tabak, however, does not argue on appeal that the court committed fundamental error. Thus, he has waived this issue and we do not address it. *See State v. Moreno-Medrano*, 218 Ariz. 349, 354, ¶¶ 16-17, 185 P.3d 135, 140 (App. 2008) (declining to review for fundamental error when appellant failed to raise claim in trial court and failed on appeal to address whether alleged error was fundamental); *see also State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390

(1989) (holding that the failure to argue a claim usually constitutes abandonment and waiver of such claim) (citations omitted).

IV. Expert Testimony: Identification

¶24 Tabak claims the court fundamentally erred in allowing the State to "utilize[] the police officers as experts to discuss that the show-up identification was proper[.]" Several officers involved in the witnesses' identification of Tabak testified that they were trained to conduct show-up identifications in a non-suggestive manner when a suspect is apprehended soon after an alleged crime was committed. They further testified that, when witnesses' memories "are still fresh," a show-up procedure is preferred to waiting until later to conduct a live or photo line-up. On the issue of memory, an officer opined "the more recent the better."

¶25 We disagree with Tabak's contention that the officers' testimony regarding "memory" amounted to improper expert testimony. Rather, the testimony merely recounted the commonly understood notion that memory about a specific incident deteriorates over time, thus providing support for conducting show-up identifications soon after a suspect is apprehended. Further, the officers were entitled to testify about their training regarding when and how to conduct show-up identifications. This testimony assisted the jury to understand

why the police employed show-up procedures in this case. *See* Ariz. R. Evid. 702.[3] "The test of whether a person is an expert is whether a jury can receive help on a particular subject from the witness." *State v. Davolt*, 207 Ariz. 191, 210, ¶ 70, 84 P.3d 456, 475 (2004). The officers did not opine that the show-up procedures they used passed constitutional muster relative to Tabak's due process rights. Accordingly, the court did not err in failing to intervene *sua sponte* and order the testimony stricken. No error, fundamental or otherwise, occurred.[4]

V. Rule 20

¶26 Tabak moved at the conclusion of the State's case in chief for a judgment of acquittal with respect to Count 1

---

[3] Rule 702, as applicable at the time of trial, stated:

> If . . . specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[4] Defendant also cannot meet his burden to affirmatively establish prejudice. The court instructed the jury:

> Expert opinion testimony should be judged just as any other testimony. You are now bound by it. You may accept it or reject it in whole or in part, and you should give it as much credibility and weight as you think it deserves, considering the witness' qualifications and experience, the reasons given for the opinions and all the other evidence.

pursuant to Arizona Rule of Criminal Procedure 20. The court denied the motion. Tabak argues the court erred in denying his motion because "there was no evidence of the gun being pointed at [the victim] or that he was actually placed in reasonable apprehension separate and apart from the evidence that a gun was discharged towards him for Count 2." *See* A.R.S. §§ 13-1203(A)(2), -1204(A)(2). We disagree.

¶27 We review *de novo* a trial court's denial of a Rule 20 motion. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). A motion for judgment of acquittal must be granted when "there is no substantial evidence to warrant a conviction." Ariz. R. Crim. P. 20(a). "'Substantial evidence' is evidence that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Jones*, 125 Ariz. 417, 419, 610 P.2d 51, 53 (1980).

¶28 Contrary to Tabak's argument that the aggravated assault statues apply a subjective standard to a victim's apprehension, we have held that "[e]ither direct or circumstantial evidence may prove the victim's apprehension." *State v. Wood,* 180 Ariz. 53, 66, 881 P.2d 1158, 1171 (1994); s*ee also State v. Angle,* 149 Ariz. 499, 504, 720 P.2d 100, 105 (App. 1985) (noting the state need not present testimony from the victim that he or she was actually afraid; rather, the element

can be established by circumstantial evidence), *vacated in part on other grounds,* 149 Ariz. 478, 720 P.2d 79 (1986).

¶29 There is sufficient circumstantial evidence in this case to prove the victim's reasonable apprehension. EM testified that, before she heard a gunshot, she observed from her driver's seat Tabak chasing the victim past the passenger side of her car. Although EM could not see a gun because of her obstructed view, she testified she saw Tabak's arm was raised and "somebody else saw the gun."[5] EM also heard Tabak say "Remember me, mother ------" just before he fired the gun. The fact the victim was running away from Tabak, who was by some reports pointing a gun at the victim and making threatening comments, is substantial evidence that Tabak used a firearm to intentionally place the victim in reasonable apprehension of imminent physical injury. We therefore conclude there was substantial evidence to support a finding of guilt on Count 1.

VI. Sentencing: Statutory Aggravating Circumstance

¶30 Finally, Tabak argues the court improperly considered the threatened infliction of serious physical injury as an aggravating sentencing factor because "it was already encompassed in the convictions," in violation of A.R.S. § 13-701 (D)(1). Whether a court properly considered an aggravating

[5] Defendant did not object to, or move to strike, this testimony.

factor when sentencing a defendant presents a legal question that we review de novo. *State v. Alvarez,* 205 Ariz. 110, 113, ¶ 6, 67 P.3d 706, 709 (App. 2003).

¶31 Under A.R.S. § 13-701(D)(1), the court shall consider the threatened infliction of serious physical injury as an aggravating factor unless this circumstance is an "essential element" of the offense:

> D. For the purpose of determining the sentence pursuant to subsection C of this section, the trier of fact shall determine and the court shall consider the following aggravating circumstances . . . :
>
> > 1. Infliction or threatened infliction of serious physical injury, *except if this circumstance is an essential element of the offense of conviction* or has been utilized to enhance the range of punishment under § 13-704.

(Emphasis added). If threatened infliction of serious physical injury is an essential element of the charged offense, the court cannot use this factor to aggravate the sentence. *See State v. Pena,* 209 Ariz. 503, 506-07, ¶ 14, 104 P.3d 873, 876-77 (App. 2005) (confirming it is improper to use infliction of serious physical injury as an aggravator when defendant was convicted of aggravated assault based on serious physical injury).

¶32 Tabak was charged with two counts of aggravated assault. Both of the underlying assault charges were based on the victim's "apprehension of imminent physical injury" in

accordance with A.R.S. § 13-1203(A)(2). In accordance with A.R.S. §§ 13-1203(A)(2) and 12-1304(A)(2), the jury was instructed that the essential elements for each count included:

> 1) The defendant intentionally put another person in reasonable apprehension of imminent physical injury, and
>
> 2) The defendant used a deadly weapon.

The jury convicted Tabak on both charges and found the offenses to be "dangerous" because his actions involved the use of a firearm. *See* A.R.S. § 13-105(13), (15).

¶33 The State argues that although the jury was required to find that Tabak placed the victim in apprehension of imminent "physical injury," the jury was not required to find that he threatened "*serious* physical injury." (Emphasis added). Therefore, the State argues, Tabak's threatened infliction of *serious* physical injury was not an essential element of the aggravated assault offenses and could be considered by the court as an aggravating factor. We agree.

¶34 Our legislature has separately defined "physical injury" and "serious physical injury" in A.R.S. § 13-105(33) and -105(39), respectively. These phrases are not the same.[6] The

---

[6] A.R.S. § 13-105 provides in pertinent part:

> In this title, unless the context otherwise requires:
> . . .

assault charges against Tabak required proof of the victim's reasonable apprehension of imminent "physical injury." Proof of the threatened infliction of "serious physical injury" is not an "essential element" of these assault offenses. The fact that Tabak's conduct accomplished both the placing of the victim in apprehension of imminent physical injury and the threatening of serious physical injury makes the threat of "serious physical injury" an essential element of these assault offenses.

¶35 We conclude, therefore, that the trial court did not err in considering this aggravating circumstance in sentencing.

CONCLUSION

¶36 Defendant's convictions and sentences are affirmed.

/s/

JOHN C. GEMMILL, Presiding Judge

CONCURRING:

/s/

MARGARET H. DOWNIE, Judge

/s/

LAWRENCE F. WINTHROP, Chief Judge

> 33. "Physical injury" means the impairment of physical condition.
> . . .
>
> 39. "Serious physical injury" includes physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, serious impairment of health or loss or protracted impairment of the function of any bodily organ or limb.