IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06/30/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0222
	)	DEPARTMENT D
v.	)	**MEMORANDUM DECISION**
DAVID KENT STEWART, Appellant.	)	(Not for Publication - Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Navajo County

Cause No. S0900CR20090469

The Honorable John N. Lamb, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Adriana M. Rosenblum, Assistant Attorney General
Attorneys for Appellee

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By Samuel J. Roser
Attorneys for Appellant

G E M M I L L, Judge

¶1 David Stewart appeals his two convictions for aggravated assault (victim substantially impaired; and temporary but substantial disfigurement or impairment, a non-dangerous

offense). In his brief, Stewart contends the trial court erred in admitting cumulative and inflammatory photographs of the victim's injuries. He asks this court to reverse based on this alleged abuse of discretion. The State requests we affirm Stewart's convictions contending (1) the photographs are not inflammatory; (2) their admission went to show an element of a charge (the severity of the victim's injuries); (3) Stewart's counsel failed to preserve the issue for appeal and can only seek reversal for fundamental error; and (4) no fundamental error exists. For the reasons that follow, we affirm Stewart's convictions and sentences.

BACKGROUND AND PROCEEDURAL HISTORY

¶2 In recognition of the jury's ability to see, hear, and make inferences from evidence presented at trial, this court views the facts in the record in the light most consistent with the jury's verdict and, thus, with sustaining Stewart's convictions. *See State v. Guerra*, 161 Ariz. 289, 293, 778 P.2d 1185, 1189 (1989). With that principle in mind, the following facts are supported by the record.

¶3 On the evening of November 23, 2008, Susan Logsdon and David Stewart went to a bar. A woman, who Stewart had previously dated, later entered with a male friend. When the woman arrived, Logsdon wanted to leave because Stewart seemed "jealous" of the woman's male friend. Logsdon also made remarks

about the woman that embarrassed Stewart. Both Logsdon and Stewart decided to end their outing and return to his house, where Logsdon could get her car. They left the bar in Stewart's truck.

¶4 After they got into his truck, Stewart hit Logsdon, knocking her head against the passenger window. Logsdon tried, but was unable, to get out of the truck after that first hit. The beating continued en route to Stewart's home, intensified in the truck after Stewart parked and ended with Logsdon covered in blood and lying in the dirt of Stewart's driveway.

¶5 The lengthy beating that night included an episode in which Logsdon fell backward out of the parked truck's passenger door. She did not completely fall out of the truck, though, because her feet were trapped in the truck. This left her head and torso dangling outside. Although Stewart testified he was concerned she might have been "passed out" at that point because she was not moving, he repeatedly kicked her in the head and screamed at her to get out of the truck.

¶6 Stewart then pulled Logsdon's body from the passenger side and threw her on the ground. Stewart repeatedly kicked and "stomp[ed] on" Logsdon and when she tried to get up, he pushed her down with his foot, "stand[ing] on her chest" until she "got quiet and still." Stewart went inside his house and left Logsdon lying on the ground.

¶7 Logsdon "woke up" and went to her friend's house to call 911. Minutes later, Deputy A. from the sheriff's department arrived. Logsdon described the severe beating Stewart had delivered that evening. During the attack, Logsdon had sustained multiple punches to the face, blows to the back of her head, and innumerable kicks to the face, head, stomach, chest, back, arms, and ribs.

¶8 Deputy A. requested an ambulance to transport Logsdon to Summit Healthcare. He rode in the back of the ambulance with Logsdon and took digital photographs of her injuries. The photographs show blood in Logsdon's hair; a wound on the right side of her mouth; scrapes on both forearms; the initial stages of bruising near her temples and brows; red areas on her shoulder blades, back, and left shoulder; and redness around her neck. Logsdon's signs of trauma, and her reporting moments of unconsciousness during the beating, prompted the emergency room doctor (Dr. Johnson) to order X-rays of her chest and CAT scans of her head. He discharged her with instructions consistent with having suffered a closed head injury.

¶9 Two to three days later, Logsdon's family members took photographs of her injuries which had started to "com[e] out" and show her bruising more dramatically. Logsdon's father also took a picture of her injured forearm and knee, both of which had started to swell after two days. She required eight

stitches in her mouth, and briefly passed out a few days later from a likely concussion.

¶10 In June, 2009, the State indicted Stewart on five counts (reduced to four at trial) of aggravated assault stemming from that night.[1] Included in the counts was a class four felony requiring the State to show, in pertinent part, that Stewart recklessly caused physical injury to Logsdon "by any means of force which caused temporary but substantial disfigurement, [or] temporary but substantial impairment of any body . . . part . . ." After a two-day trial, a jury acquitted Stewart of two of the four counts, and convicted him of the remaining two counts. Specifically, the jury found Stewart guilty of Count I: Aggravated Assault, a class six felony (victim substantially impaired), and Count IV: Aggravated Assault, a class four felony (temporary but substantial disfigurement or impairment, a non-dangerous offense).[2]

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[1] The court granted Stewart's Rule 20 motion for a directed verdict of not guilty for Count IV of the Indictment (a class three felony). Count V of the Indictment (a class four felony) was then renamed "Count IV" at trial because the original Count IV was no longer at issue.

[2] The sentencing minute entry dated February 23, 2010, correctly states Stewart's convictions for the class six and class four felonies. We note that, according to the transcript from the February 23, 2010 sentencing hearing, the court inadvertently referenced the conviction on Count IV as a class *three* felony. The original Count IV alleged a class four felony, but the renumbered Court IV, for which Stewart was convicted, alleged a class four felony.

¶11 The trial court found Stewart eligible for probation, suspended imposition of sentence, and imposed four years' probation. Included among the terms of probation was a requirement that Stewart serve eight months' incarceration in Navajo County jail. Stewart timely appeals. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(1) (2003), 13-4031 (2010) and 13-4033 (2010).

Photograph Set One

¶12 At trial, the State offered printouts of the digital photographs Deputy A. took of Logsdon the night of November 23, 2008 ("Photograph Set One"). At bar, Stewart objected to the printouts of Photograph Set One on two grounds: (1) lack of proper foundation, and (2) absence of a color scale.

¶13 The judge initially sustained the objection to foundation of Photograph Set One. The State then presented witness testimony (from Logsdon) that the photographs were (1) of her and (2) taken sometime during or after her trip to the hospital. Additionally, Deputy A. testified that he took the photographs and affirmed that the printouts accurately illustrate the injuries he saw that night. The State's foundation for Photograph Set One satisfied the court, and over Stewart's continuing objection to foundation ("Continuing objection on the grounds stated, at least the first ground"),

the court admitted Photograph Set One.

¶14 The judge overruled Stewart's objection to the lack of a color scale. The State suggested the printouts did not need a color scale because, although the printouts came from a color printer and computers may "print out differently," Stewart also had access to a disk containing the digital photographs. The color, the State said, was "the best we [could] do." On cross-examination of Dr. Johnson, Stewart introduced his own color printouts of Photograph Set One (Exhibit B). Though Dr. Johnson noticed "there's different shades" of color in the State's and Stewart's Photograph Set One, he could not say which set of printouts was "more correct."

Photograph Set Two

¶15 The State later moved to introduce the photographs of Logsdon's injured face, forearm and knee that show significant bruising two to three days later ("Photograph Set Two"). Stewart objected to the admission of Photograph Set Two citing simply, "same objection."

¶16 As with Photograph Set One, the State established the foundation for Photograph Set Two. Logsdon testified her family members took the photographs in Photograph Set Two at her parents' house two to three days following the incident. She testified Photograph Set Two accurately depicted the injuries to her face, forearm and knee. Two of the State's witnesses (Dr.

Johnson and Deputy A.) confirmed, based on their training and experience, that bruising will "come out" after a couple of days. Dr. Johnson also testified Photograph Set Two depicted the development of injuries consistent with those shown in Photograph Set One. With this foundation for Photograph Set Two, the trial court admitted those photographs over Stewart's objection.

¶17 As he had done with Photograph Set One, Stewart introduced his own printouts of Photograph Set Two (Exhibit C). Once admitted, Stewart received permission from the court to publish the photographs to the jury. Stewart cross-examined Dr. Johnson regarding the color scale of Photograph Set Two (as he had done with Photograph Set One).

ANALYSIS

¶18 Stewart argues on appeal that the trial court committed reversible error in admitting Photograph Set Two. He does not assert that his convictions should be reversed based on the admission of Photograph Set One.

¶19 Stewart did not object specifically to the allegedly inflammatory and cumulative nature of Photograph Set Two. This court only considers errors in the admission of evidence when an appellant made a timely and specific objection to the admission of that evidence at trial. Ariz. R. Evid. 103(a)(1). "It is a fundamental rule of appellate procedure in Arizona that the

trial court must be given an opportunity to correct the errors at trial, and where no such claim of error was made — at the trial court level — the claim is waived." *State v. Totress*, 107 Ariz. 18, 20, 480 P.2d 668, 670 (1971).

¶20 Though Stewart's objections to the admission of Photograph Set Two were timely, they were not specific to the claim he makes now on appeal. At trial, Stewart objected to Photograph Set Two by asserting the "same objection" he raised to Photograph Set One. He did not object on the basis that the pictures within Photograph Set Two were cumulative or inflammatory.

¶21 Accordingly, Stewart has waived any claim of error based on abuse of discretion in admitting Photograph Set Two, unless the error constitutes fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005); Ariz. R. Evid. 103(d). When a defendant has not made a specific and timely objection at a criminal trial, this court will still engage in fundamental error review. *Henderson,* 210 Ariz. at 567, 115 P.3d at 607 (citation omitted).

¶22 We have conducted a review to determine if admission of Photograph Set Two constituted fundamental, prejudicial error. To find fundamental error, an appellant must satisfy a sequential, three-pronged test. First, the appellant must show error occurred. *Id*. at 568, ¶ 23, 115 P.3d at 608. Second, the

court must determine the error was fundamental, requiring the appellant to show the error "took 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 ¶ 24 (citation omitted). Third, if the appellant establishes an error and the result of the error deprived him of a fair trial, he also must show the error actually prejudiced him. *Id*. at ¶ 26.

¶23 Stewart contends the trial court committed an abuse of discretion in admitting Photograph Set Two because the photographs are allegedly inflammatory and cumulative. "In every case in which there is probative value to the exhibit, it is for the trial court to weigh the value against the danger of prejudice and its conclusion on this point will not be disturbed absent a clear abuse of discretion." *State v. Chapple*, 135 Ariz. 281, 290, 660 P.2d 1208, 1217 (1983) (citation omitted).

¶24 After reviewing the photographs and the record of this trial, we find no abuse of discretion, much less any fundamental error, in their admission into evidence. The photographs were neither cumulative nor particularly inflammatory or gruesome, and they are probative of pertinent factual issues.

¶25 The pictures in Photograph Set Two were taken two to three days after those in Photograph Set One. The later photographs help convey the extent of Logsdon's injuries as reflected in her developed bruising a few days after the

incident.

¶26 In support of his argument that these pictures should have been excluded, Stewart relies on our supreme court's opinion in *Chapple*. Although the *Chapple* opinion sets forth important principles, we do not find *Chapple* to be persuasive here because we find very little similarity between the photographs in this case and the photographs in *Chapple*. Photographs in *Chapple* portrayed the victim's "burned body, face and skull, the entry wound of the bullet, a close-up of the charred skull with a large bone flap cut away to show the red-colored, burned dura matter on the inside rim of the skull with the pink brain matter beneath . . . the bullet embedded in the brain. . . . [T]he brain as the bullet is being removed." *Id.* at 287, 660 P.2d at 1214. The supreme court decided photographs of that cumulative and inflammatory nature should have been excluded from evidence because "there was nothing of significance to weigh and the only possible use of the photographs would have been to inflame the minds of the jury or to impair their objectivity." *Id.* at 290, 660 P.2d at 1217. We do not find Photograph Set Two to be cumulative or inflammatory.

CONCLUSION

¶27 For these reasons, we affirm Stewart's convictions and

sentences.

__/s/_____
JOHN C. GEMMILL, Judge

CONCURRING:

____/s/_____
PATRICK IRVINE, Judge

____/s/_____
PHILIP HALL, Judge