IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 06/07/2011
RUTH A. WILLINGHAM, CLERK
BY: DLL

STATE OF ARIZONA, Appellee,	)	1 CA-CR 10-0471
	)	DEPARTMENT E
v.	)	**MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)
THEODORE NEAL, Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2009-145495-001 SE

The Honorable George H. Foster, Jr., Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Section
and Liza-Jane Capatos, Assistant Attorney General
Attorneys for Appellee

Sharmila Roy, Attorney at Law — Laveen
by Sharmila Roy
Attorney for Appellant

P O R T L E Y, Judge

¶1 Defendant, Theodore Neal, challenges his conviction for aggravated domestic violence. He contends that the trial court erred when it admitted hearsay evidence. We disagree.

FACTUAL BACKGROUND

¶2 Mesa Police responded to a 9-1-1 call on July 11, 2009 that Neal had assaulted his wife. Although Neal was not at the apartment when police arrived, he was arrested when he returned home.

¶3 Neal was charged and convicted of aggravated domestic violence. Because of his two prior felony convictions, Neal was sentenced to 3.5 years in prison, and given credit for 254 days of presentence incarceration. 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 and -4033(A)(4) (2010).

DISCUSSION

¶4 Neal first argues that the trial court improperly admitted hearsay statements. Specifically, he contends that his wife's prior inconsistent statements were the only evidence of the crime and that the court erred when it admitted the statements without making findings. We review the admission of evidence for an abuse of discretion. *State v. Sucharew*, 205 Ariz. 16, 23, ¶ 19, 66 P.3d 59, 66 (App. 2003).

¶5 At trial, the victim, Neal's wife, was called by the State as a witness. She testified that she had no memory of calling 9-1-1 or speaking to police, and did not remember what happened that evening.

¶6 In addition to listening to the 9-1-1 recording, the jury first heard from Officer O'Sullivan. He testified that he spoke to the victim at the apartment and noticed that she was crying and had red marks on her back. Before he could relate what the victim told him, there was a hearsay objection. The trial court overruled the objection because the statement was being used "to show a recent fabrication." O'Sullivan then told the jury what the victim had described to him, which resulted in her 9-1-1 call.

¶7 Although Neal contends that his wife's prior statements were inadmissible hearsay,[1] there is an exception to the general rule. Specifically, Arizona Rule of Evidence 801(d)(1)(A) provides that a prior inconsistent statement is not hearsay, so long as the statement was made by a witness who is subject to cross examination. *See Sucharew*, 205 Ariz. at 23, ¶ 20, 66 P.3d at 66; *State v. Thompson*, 167 Ariz. 230, 231, 805 P.2d 1051, 1052 (App. 1990). In fact, "[a] statement's

[1] 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 is generally inadmissible. Ariz. R. Evid. 801(c) & 802.

inconsistency . . . is not limited to cases in which diametrically opposite assertions have been made. A claimed inability to recall, when disbelieved by the trial judge, may be viewed as inconsistent with previous statements." *State v. King*, 180 Ariz. 268, 275, 883 P.2d 1024, 1031 (1994) (alteration in original) (citations & internal quotation marks omitted). Consequently, because the victim was subject to cross examination, her statements to police were admissible.[2]

¶8 Neal, however, argues that *King* requires that the trial court make findings before allowing prior inconsistent statements. In *King*, a first-degree murder case, a witness claimed a lack of memory, and the State wanted to introduce his prior statements. *Id.* at 270, 274-75, 883 P.2d at 1026, 1030-31. The trial court concluded that the witness was "feigning his lack of memory" and admitted the statements pursuant to Rule

[2] Neal also claims that the trial court erred when it admitted the statements pursuant to Rule 801(d)(1)(B). The Rule provides that an out-of-court statement is not hearsay if the declarant testifies at trial, is available for cross examination, and the statement is "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive . . . ." Even if the Rule was inapplicable, because we agree that the court properly admitted the statements pursuant to Rule 801(d)(1)(A), we find no error. *See State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (holding that the appellate court can affirm a ruling even though the trial judge reached the right conclusion for the wrong reason).

801(d)(1).[3] *Id*. at 275, 883 P.2d at 1031. Our supreme court found that admission of the statements was not an abuse of discretion and affirmed the conviction and sentence. *Id.*

¶9 *King* does not require the trial court to make findings about the credibility of the witness before admitting prior inconsistent statements. *See State v. Robinson*, 165 Ariz. 51, 58-59, 796 P.2d 853, 860-61 (1990) (finding no error when prior inconsistent statements admitted even though the trial court "did not know whether the witness was being evasive or was merely typical of many people with poor recollection"). Consequently, the learned trial court did not abuse its discretion.

¶10 Neal next contends that O'Sullivan should not have been allowed to repeat the victim's statements at trial pursuant to Rule 403. Neal, however, did not make the objection at trial, so we only review for fundamental error. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is error that "goes to the foundation of his case, takes away a right that is essential to his defense, and is of such a magnitude that he could not have received a fair trial." *Id*. at 568, ¶ 24, 115 P.3d at 608. Fundamental error

[3] The court also admitted the statements pursuant to Rule 803(5). That Rule is not at issue here.

also requires proof of prejudice. *Id*. at 567, ¶ 20, 115 P.3d at 607.

¶11 We find no error. The victim's prior statements were relevant to prove the substantive offense and to impeach her testimony. Moreover, because there was other evidence of the crime, Neal has not demonstrated any prejudice.

CONCLUSION

¶12 For the foregoing reasons, we affirm Neal's conviction and sentence.

/s/
_____
MAURICE PORTLEY, Presiding Judge

CONCURRING:

/s/
_____
LAWRENCE F. WINTHROP, Judge

/s/
_____
SHELDON H. WEISBERG, Judge