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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THE STATE OF ARIZONA, Appellee, v. ABEL HINOJOSA, Appellant.	2 CA-CR 2012-0026 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. S1100CR200900677

Honorable Boyd T. Johnson, Judge

AFFIRMED IN PART
VACATED AND REMANDED IN PART

Thomas C. Horne, Arizona Attorney General
By Kent E. Cattani, Joseph T. Maziarz,
and Nicholas Klingerman — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Abel Hinojosa was convicted of two counts of aggravated assault with a deadly weapon. On appeal, Hinojosa argues the trial court

erred by admitting hearsay and irrelevant evidence, permitting a flight instruction, and sentencing him to flat-time sentences. For the following reasons, we affirm his convictions but vacate his sentences and remand for resentencing.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding Hinojosa's convictions. *See State v. Gipson*, 229 Ariz. 484, n.1, 277 P.3d 189, 190 n.1 (2012). In early December 2008, Hinojosa joined friends and family at victim J.A.'s house for a birthday party and to watch a boxing match. Hinojosa, disappointed his fighter lost, began challenging other people there to a fight. Hinojosa succeeded in starting a fight with several others at the party, including B.B. and J.A. During the fight, Hinojosa stabbed B.B. and J.A., puncturing one of J.A.'s lungs. After B.B. subdued him, Hinojosa left.

¶3 Hinojosa subsequently was charged with and convicted of two counts of aggravated assault with a deadly weapon. The jury found one count to be a dangerous nature offense and the trial court found two prior felony convictions applied to the other count. The court sentenced him to two concurrent terms of imprisonment of 11.25 years. Hinojosa appeals from his convictions and sentences.

Hearsay Evidence

¶4 Hinojosa first argues the trial court erred by admitting hearsay evidence about text messages in violation of Rule 802, Ariz. R. Evid. We review rulings on the admission of evidence for an abuse of discretion. *See State v. Dann*, 220 Ariz. 351, ¶ 66, 207 P.3d 604, 618 (2009).

¶5 Hearsay is "a statement . . . the declarant does not make while testifying at the current trial or hearing . . . offer[ed] in evidence to prove the truth of the matter asserted in the statement." Ariz. R. Evid. 801(c).[1] Hearsay is inadmissible unless an exception applies. Ariz. R. Evid. 802, 803. Several exceptions to this rule exist, and the state argues either the excited utterance or the present sense impression exception applies here.[2] An excited utterance is a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Ariz. R. Evid. 803(2). "This exception to the rule generally barring the admission of hearsay turns on three factors: there must be a startling event, the words must be spoken soon afterwards, and the words must relate to the startling event." *State v. Hausner*, 230 Ariz. 60, ¶ 63, 280 P.3d 604, 621 (2012).

¶6 M.V., fifteen years old at the time of the crime, testified that a fight "exploded in the house," that "everybody was fighting everybody" and that he was "the only teenager there." He saw the adults go outside, and then saw J.A. come back in "covered in blood." M.V. testified he did not go outside and did not see Hinojosa stab J.A. He saw J.A.'s stab wounds and concluded Hinojosa stabbed J.A. "[b]ecause

[1]The Arizona Rules of Evidence were amended effective January 1, 2012, but the only changes potentially relevant here were purely stylistic and were not meant to change any ruling on the admissibility of evidence. *See* Ariz. R. Evid. 801 cmt., 802 cmt., 803 cmt.

[2]Hinojosa's counsel argues on appeal "[t]he state [below] did not offer any specific exception to the hearsay rule in support of the admission of [the witness's] testimony." She is incorrect. The state plainly argued below the evidence was admissible as both an excited utterance and a present sense impression.

[Hinojosa] was the aggressor . . . [a]nd since he threw the first punch and it escalated outside, I just figured . . . it was him." M.V. was responsible for watching small children when the fight began. M.V. sent his mother a text message, stating the defendant "stabbed J[.A]."

¶7 At trial, before M.V. testified, Hinojosa objected to his proposed testimony about the text message as hearsay, on the ground that M.V. would be relating what others had told him. The prosecutor avowed M.V.'s text was "a conclusion that he drew based on what he observed." The trial court asked whether M.V. had to perceive something to relate it and the prosecutor responded that M.V. did perceive the fight and then drew a conclusion. Hinojosa did not disagree with the prosecutor or expand on his own objection. The court overruled the objection.

¶8 M.V. testified he sent the text message contemporaneously with an event that would be startling and stressful for a teenager charged with the care of young children, and described what he observed and what he thought was going on in response to the startling event. Analyzing it under the hearsay exceptions, M.V.'s testimony therefore was admissible as an excited utterance. *See* Ariz. R. Evid. 803(2); *Hausner*, 230 Ariz. 60, ¶ 63, 280 P.3d at 621. Because we conclude testimony about the text message was admitted properly as an excited utterance, the trial court did not abuse its discretion. We do not reach the state's alternative argument that it qualified as a present sense impression.

¶9 Hinojosa complains that M.V. did not actually see him stab the victim. But that argument goes to M.V.'s competency to testify under Rule 602, Ariz. R. Evid.,

which states "A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." And because Hinojosa did not cite Rule 602 or make any other foundational objection in the trial court, even in response to the court's statement that the witness had to perceive something to testify about it, his argument is forfeited absent fundamental, prejudicial error.[3] *See State v. Moody*, 208 Ariz. 424, ¶ 120, 94 P.3d 1119, 1150 (2004) (absent fundamental error, overruled objection to evidence on one ground waives objection on another on appeal). But because Hinojosa has not argued admission of this evidence amounted to fundamental error and we do not find that it was, this argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived if not argued on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650-51 (App. 2007) (we will not ignore fundamental error if we find it). Moreover, even if he had argued fundamental error, he failed to support his competency argument with citations to authority, and waived his argument by failing to develop it fully on appeal. *See* Ariz. R. Civ. App. P. 13(a)(6) (argument must contain citations to authority relied on); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument for appellate review waives claim). He similarly has failed to adequately argue here or object below on a double hearsay ground and, even if we could infer such an argument from his brief, we find it waived. *See* Ariz. R. Civ. App. P. 13(a)(6); *Bolton*, 182 Ariz. at 298, 896 P.2d at 838. And, to the extent Hinojosa argues

[3]Similarly, Hinojosa did not argue here or object below on the ground M.V.'s statement was a prior consistent statement.

M.V.'s statement was unreliable, that argument goes to its weight not its admissibility. *See State v. Jeffers*, 135 Ariz. 404, 419-20, 661 P.2d 1105, 1120-21 (1983). Accordingly, we do not address this argument further.

Irrelevant Evidence

¶10 Hinojosa next argues the trial court erred by allowing irrelevant testimony that an arrest warrant had been issued for him. We review rulings on the admission of evidence for an abuse of discretion. *See State v. Dann*, 220 Ariz. 351, ¶ 66, 207 P.3d 604, 618 (2009).

¶11 Only relevant evidence is admissible at trial, *see* Ariz. R. Evid. 402, and to be relevant, evidence must have "any tendency to make a fact more or less probable than it would be without the evidence" and that fact must be "of consequence in determining the action," Ariz. R. Evid. 401(a), (b). However, even relevant evidence may be excluded if its prejudicial impact on the trier of fact will outweigh its probative value. Ariz. R. Evid. 403.

¶12 At trial, the state asked Officer Rodriguez if a warrant issued for Hinojosa's arrest. Rodriguez affirmed that a warrant had been issued, and that it was over a year later before Hinojosa was apprehended. Hinojosa argues this evidence was not relevant to show his flight because it is not evidence of his flight and evidence of the warrant did not make Hinojosa's commission of the crime more probable than not. However, the warrant was relevant to show the motive behind Hinojosa's actions—and prolonged disappearance—after the crime. *See State v. Henry*, 176 Ariz. 569, 579, 863 P.2d 861, 871 (1993). The jury could have inferred that, because the warrant was outstanding for

so long, Hinojosa was avoiding arrest. Moreover, this circumstantial evidence need not, as Hinojosa suggests, make it "more probable than not" that Hinojosa committed the charged crimes. Rather, the evidence need only make it "more or less probable" that Hinojosa committed the crimes, and this evidence was probative on that issue. *See* Ariz. R. Evid. 401(a). The jury could have inferred a consciousness of guilt for the crimes charged from this evidence. *See State v. Bible*, 175 Ariz. 549, 592, 858 P.2d 1152, 1195 (1993). We therefore find no abuse of discretion in admitting the evidence of the warrant.

Flight Instruction

¶13 Hinojosa next argues the trial court erred by giving a flight instruction to the jury. We review a trial court's decision to give a jury instruction for an abuse of discretion. *See State v. Dann*, 220 Ariz. 351, ¶ 51, 207 P.3d 604, 616-17 (2009). Each party is entitled to a jury instruction on any theory reasonably supported by the evidence. *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998). We therefore review whether sufficient evidence supports giving the requested instruction. *Id.* ¶ 17.

¶14 Here, the evidence showed Hinojosa left the scene immediately after the fight ended. He went to his mother-in-law's home, where he had been staying for the previous six months, and bragged about his fighting prowess. His wife appeared upset but "couldn't talk about" why, and insisted she and Hinojosa leave with the children about twenty to thirty minutes later. They left in a hurry, leaving behind a car seat, bottles for their baby, and Hinojosa's bloody shirt. The police arrived later in the evening to question Hinojosa's family and collect evidence. In July 2009, Hinojosa's

mother-in-law picked up his wife and children on the United States side of the border at San Luis, Mexico, after they crossed back into U.S. territory. Despite a warrant having been issued for his arrest, Hinojosa was not apprehended until late in 2010. This evidence is more than sufficient to support the standard flight instruction, and we accordingly find no abuse of discretion in the trial court's decision to give it to the jury.

Flat-Time Sentences

¶15 Hinojosa lastly contends the trial court erred in imposing flat-time sentences for each of his convictions, as opposed to allowing him to earn one day of earned release credit for every six days he is incarcerated pursuant to A.R.S. § 41-1604.07(A). The state concedes the court improperly sentenced him to flat-time sentences for both convictions and acknowledges we should vacate his sentences and remand for re-sentencing.

¶16 As the state notes, even if Hinojosa failed to properly preserve the issue below, we will not ignore fundamental error when we see it. *See State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650-51 (App. 2007); *but cf. State v. Vermuele*, 226 Ariz. 399, ¶ 14, 249 P.3d 1099, 1103 (App. 2011) (defendant did not forfeit appellate review for all but fundamental error when alleged errors not apparent until trial court pronounced sentence). Because an illegal sentence may constitute fundamental error, *State v. Lewandowski*, 220 Ariz. 531, ¶ 4, 207 P.3d 784, 786 (App. 2009), we exercise our discretion and address the merits of this issue, *see State v. Smith*, 203 Ariz. 75, ¶ 12, 50 P.3d 825, 829 (2002) (court has discretion to consider arguments even if waived). We

review de novo whether a trial court correctly interpreted and applied sentencing statutes. *See State v. Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007).

¶17 Here, the trial court sentenced Hinojosa under A.R.S. § 13-704(G) to a term of 11.25 years, to be served as a flat-time sentence for his conviction of aggravated assault, a class 3, dangerous, non-repetitive felony. For his conviction of aggravated assault with two prior felony convictions, a class 3, non-dangerous felony, the court sentenced him under A.R.S. § 13-703(O) to serve a concurrent term of 11.25 years, also as a flat-time sentence.

¶18 The trial court erred in sentencing Hinojosa pursuant to §§ 13-704(G) and 13-703(O) because this statute was not effective until January 1, 2009, and he committed the offenses in December 2008. *See* 2008 Ariz. Sess. Laws, ch. 301, § 28; *see also State v. Provenzino*, 221 Ariz. 364, n.1, 212 P.3d 56, 58 n.1 (App. 2009) (we apply law as existed at time of offense). However, the relevant portion of the statutes in effect at the time he committed the offenses, former A.R.S. § 13-604(D) and (I) (2008), 2005 Ariz. Sess. Laws, ch. 188, § 1, had no substantive differences from their amended counterparts, §§ 13-704(G) and 13-703(O). Both former subsections, § 13-604(D) and (I), stated a defendant sentenced to imprisonment under the relevant subsection is not "eligible for suspension of sentence, probation, pardon or release from confinement on any basis except as specifically authorized by section 31-233[(A) or (B), 1995 Ariz. Sess. Laws, ch. 199, § 3] until the sentence imposed by the court has been served, the person is eligible for release pursuant to section 41-1604.07 or the sentence is commuted." 2005 Ariz. Sess. Laws, ch. 188, § 1.

¶19 Our supreme court has held that flat-time sentences are not permitted unless specifically authorized by statute. *See In re Webb*, 150 Ariz. 293, 294, 723 P.2d 642, 643 (1986) (flat-time sentence not authorized in statute controlling imprisonment for misdemeanor offense). Neither § 13-604(D) nor (I) stated that the term of imprisonment imposed could be flat-time. Section 41-1604.07(A) was in effect at the time Hinojosa committed the offenses and provides that each eligible prisoner in the earned release credit class "shall be allowed an earned release credit of one day for every six days served . . . except for those prisoners who are sentenced to serve the full term of imprisonment imposed by the court." But § 41-1604.07(A) does not give courts authority to impose flat-time sentences. *See State v. Harris*, 133 Ariz. 30, 31, 648 P.2d 145, 146 (App. 1982) (whether prisoner eligible for release on parole or absolute discharge not for courts to decide but decision for Board of Pardons and Paroles or Department of Corrections). Because neither § 13-604(D) nor (I), 2005 Ariz. Sess. Laws, ch. 188, § 1, specifically empowered the trial court to impose a flat-time sentence, the court exceeded its authority in doing so. *See State v. Vargas-Burgos*, 162 Ariz. 325, 326, 783 P.2d 264, 265 (App. 1989) (trial court has discretion to impose sentence only within statutory limits). Accordingly, Hinojosa's sentences were illegal and we find the error to be fundamental. *See State v. Cox*, 201 Ariz. 464, ¶ 13, 37 P.3d 437, 441 (App. 2002). And, because Hinojosa may be eligible for release after serving approximately 9.64 years had the court properly sentenced him, the error prejudices him. *See* § 41-1604.07(A); *State v. Griffin*, 154 Ariz. 483, 484-86, 744 P.2d 10, 11-13 (1987) (illustrating difference between flat-time and traditional sentence with possibility of earned release credits); *see also*

Henderson, 210 Ariz. 561, ¶ 20, 115 P.3d at 607; *cf. State v. McCurdy*, 216 Ariz. 567, n.7, 169 P.3d 931, 938 n.7 (App. 2007) (improperly enhanced sentence prejudicial). Accordingly, we vacate Hinojosa's sentences.

Conclusion

¶20 For the foregoing reasons, we affirm Hinojosa's convictions but vacate his sentences and remand for resentencing.

/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*

*A retired judge of the Arizona Court of Appeals authorized and assigned to sit as a judge on the Court of Appeals, Division Two, pursuant to Arizona Supreme Court Order filed December 12, 2012.