IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

JAMES EDWARD HUGABOOM,
Appellant.

No. 2 CA-CR 2014-0279
Filed December 16, 2015

Appeal from the Superior Court in Pima County
No. CR20134758001
The Honorable Christopher C. Browning, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Section Chief Counsel, Phoenix
By Tanja K. Kelly, Assistant Attorney General, Tucson
Counsel for Appellee

Steven R. Sonenberg, Pima County Public Defender
By Michael J. Miller, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Miller concurred.

E C K E R S T R O M, Chief Judge:

¶1 Following a jury trial, appellant James Hugaboom appeals from his convictions and sentences for sexual exploitation of a minor under fifteen and sexual conduct with a minor under fifteen.[1] For the following reasons, we affirm the convictions and sentences.

Factual and Procedural Background

¶2 On October 25, 2013, Hugaboom sent his thirteen-year-old daughter, D.H., a text message asking her to come to his bedroom without clothes on. When D.H. came to the room, Hugaboom told her to lie down on the bed, then touched her breasts and vagina. He put something inside her vagina, then took pictures of her. He forced her to give him oral sex, then took her into the shower, where he masturbated and ejaculated onto her face and breasts.

¶3 Almost one week later, D.H. was trick-or-treating with a neighbor, N.M. While she was out, she got a phone call from Hugaboom, who told her that she needed to return home. D.H. became visibly upset and began crying. She told N.M. that her dad had "been touching her," taking nude photographs of her, and forcing her to perform oral sex. The following morning, N.M. contacted the police.

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[1]This appeal does not concern two additional counts to which Hugaboom pleaded guilty after the jury failed to reach a verdict and the trial court declared a mistrial as to those counts.

¶4 Hugaboom was convicted as described above and sentenced to consecutive prison terms of seventeen and twenty years. This appeal followed.

Excited Utterance

¶5 Hugaboom first argues N.M. should not have been allowed to testify regarding D.H.'s statements because the statements were hearsay. The trial court concluded that the statements were hearsay, but allowed their admission as excited utterances. *See* Ariz. R. Evid. 803(2).

¶6 In order for the excited utterance exception to apply, "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). Hugaboom claims that the exception does not apply because the startling event in question was the phone call from Hugaboom, rather than the events of October 25. Moreover, Hugaboom claims, because they were close to one week prior to the time the statements were made the events of the 25th could not be considered as the "startling event."

¶7 Assuming arguendo that the admission of these statements was error, we conclude the state has met its burden of showing the error was harmless. *See State v. Valverde*, 220 Ariz. 582, ¶ 11, 208 P.3d 233, 236 (2009). Had N.M. not been permitted to testify about what, specifically, D.H. had told her, the jury still would have heard that D.H. received a phone call from her father, became distressed, and told N.M. something that caused N.M. to contact the police. In the context of the case, the jury would have easily been able to infer from the details of D.H.'s testimony what she said to N.M. Furthermore, N.M.'s testimony did not provide any independent details that were not included in D.H.'s own testimony. *See State v. Williams*, 133 Ariz. 220, 226, 650 P.2d 1202, 1208 (1982) ("[E]rroneous admission of evidence which [is] entirely cumulative constitute[s] harmless error."). Accordingly, we conclude that any error in the admission of these statements was harmless.

Exclusion of Jury Questions

¶8 Hugaboom next claims the trial court erred when it did not allow witnesses to answer two jury questions. First, Hugaboom claims he should have been allowed to answer a juror's question "Did you know if [D.H.] has a sexual relationship with [her boyfriend] or not?" The trial court ruled that the answer was inadmissible under the "rape shield." *See* A.R.S. § 13-1421(A). The state argues that because Hugaboom failed to make an offer of proof on this issue, he has failed to preserve the issue for appellate review. We agree.

¶9 We note that the trial court's statement that "the victim's sexual activity is not admissible . . . for any purpose" was not a correct statement of the law. *See* § 13-1421(A)(1) through (5) (listing purposes for which, as a general matter, such evidence may be admitted); *State v. Gilfillan*, 196 Ariz. 396, ¶ 16, 998 P.2d 1069, 1074 (App. 2000). However, Hugaboom's arguments for the admissibility of the answer to this question are based on the premise that Hugaboom would have testified that D.H. did have a sexual relationship with her boyfriend. But Hugaboom might have testified that he did not know, or that he knew that D.H. and her boyfriend did not have a sexual relationship. Because he failed to make an offer of proof, we cannot determine whether this testimony would have been admissible, or whether any error was harmful. *See* Ariz. R. Evid. 103(a)(2); *Jones v. Pak-Mor Mfg. Co.*, 145 Ariz. 121, 129, 700 P.2d 819, 827 (1985) (rule requiring offer of proof allows appellate court to determine effect of error). We therefore must consider this claim foreclosed on appeal. *See State v. Hernandez*, 232 Ariz. 313, ¶ 37, 305 P.3d 378, 386 (2013); *State v. Perez*, 233 Ariz. 38, ¶ 19, 308 P.3d 1189, 1194 (App. 2013).

¶10 Hugaboom also argues that the trial court erred in ruling the answers to certain other jury questions would have been inadmissible hearsay. He bases this contention on the novel theory that answers to jury questions are not hearsay because they are not evidence offered by "a party." *See* Ariz. R. Evid. 801(c)(2). But Hugaboom did not present this argument to the trial court, does not now claim the exclusion was fundamental error, and therefore has

failed to establish his entitlement to appellate relief.[2] *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005); *State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

Disposition

¶11 For the foregoing reasons, we affirm Hugaboom's convictions and sentences.

[2] Hugaboom claims that his argument below that the statements were not hearsay was sufficient to preserve this issue. While Hugaboom did claim the statements were not hearsay, he did not articulate this theory. "The purpose of the rule requiring that specific grounds of objection be stated is to allow the adverse party to address the objection and to permit the trial court to intelligently rule on the objection and avoid error." *State v. Granados*, 235 Ariz. 321, ¶ 19, 332 P.3d 68, 74 (App. 2014). The trial court did not address whether the hearsay rule encompasses evidence not offered by parties, and the issue is therefore forfeited. *See State v. Williams*, 183 Ariz. 368, 380, 904 P.2d 437, 449 (1995) ("'We will not consider an evidentiary theory when it is advanced for the first time on appeal.'"), *quoting State v. Schaaf*, 169 Ariz. 323, 332, 819 P.2d 909, 918 (1991); *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008) ("[A]n objection on one ground does not preserve the issue on another ground.").