IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Appellee*,

*v.*

DEBORAH ANN DELGADO,
*Appellant*.

No. 2 CA-CR 2014-0419
Filed November 12, 2015

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Appeal from the Superior Court in Pinal County
No. S1100CR201300595
The Honorable Joseph R. Georgini, Judge

**AFFIRMED**

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COUNSEL

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

Harriette P. Levitt, Tucson
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**MEMORANDUM DECISION**

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

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

**¶1** After a jury trial, Deborah Delgado was convicted of second-degree burglary and aggravated assault. The trial court sentenced her to concurrent prison terms, the longer of which is 11.25 years. On appeal, Delgado argues the trial court improperly admitted evidence of statements she had made before being advised of her right to remain silent and after she had invoked that right, as well as evidence "concerning [her] silence or her refusal to answer questions." We affirm.

**¶2** Delgado's convictions stem from an incident in which she and her sister forced their way into their aunt's house, pushed her down, and began punching her.[1] After jury selection, the trial court held a hearing to address, inter alia, the admissibility of statements Delgado had made to a police officer who came to her grandfather's residence after the incident and statements she made to another officer following her arrest. At that hearing, Casa Grande Police Officer Amy De Leon testified that, when she had first encountered Delgado at the residence, she asked Delgado her name, and Delgado stated it was "none of [her] business." She also stated that, when she asked Delgado about obvious scratches and scrapes, Delgado had claimed "some dogs at the house had injured her." Delgado denied having been in a fight with her aunt. De Leon then arrested Delgado. De Leon testified that Delgado had not been free

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[1] We view the evidence in the light most favorable to upholding the jury's verdicts. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 2, 186 P.3d 33, 34 (App. 2008).

to leave before she was formally arrested and that she did not advise Delgado of her rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966).

**¶3** Casa Grande Police Officer Bryan Martinez testified that he had spoken to Delgado in an interview room at a police station and immediately advised her of her rights pursuant to *Miranda*. According to Martinez, after Delgado stated she understood her rights, she made several statements indicating "she didn't know why she was there," including asking, "What, did I kill somebody . . . ?" She also denied having been involved in a fight, claiming she had been with her husband. Delgado then invoked her right to counsel, and Martinez ended the interview.

**¶4** The trial court ruled that Delgado's statements to Martinez could be admitted because she had waived her right to remain silent. As to Delgado's conversation with De Leon, the court stated it would "suppress one question," specifically that it would not allow De Leon "to testify as to the question to Ms. Delgado whether she got into a fight." When the prosecutor asked whether De Leon would "be able to testify about the scratches," the court responded, "Yes," then stated, "But she will not ask that question—that question will not be referred to, and Ms. Delgado's response to that question will not be allowed."

**¶5** On the fourth day of trial, De Leon testified without objection that she had asked Delgado about scratches on her arm and chin, and Delgado had responded they had come from two small dogs. De Leon further testified that, after seeing the dogs, she had told Delgado "those dogs didn't cause those injuries." Later that day, the trial court "clarif[ied] its prior order," stating it had prohibited De Leon from testifying about her "question to [Delgado] and her response to a question that was clearly—it was an interrogation question when she was in custody before" she was advised of her rights. The court observed, "That was completely prohibited, and she complied and the State complied."

**¶6** Also on the fourth day of trial, the parties and the trial court further discussed Delgado's statements to Martinez; the

prosecutor was apparently under the impression the court had suppressed any statement Delgado had made after being advised of her rights. The prosecutor stated that Delgado's statements after the advisement were "excited utterance[s]," because "[t]here were no questions posed to her after *Miranda*, and she was still making statements." The court stated there had not been "a blanket prohibition," and the only prohibition "was that there would be no reference to invocation of the rights." It noted, however, that it would "take [the matter] under advisement." The following day, the court stated it had reviewed the interview transcript and concluded Delgado's statements "after Officer Martinez read her her rights were completely unsolicited, they were not a result of any interrogation, they were not a result of any questioning. At this point, the statements will come in." Martinez testified at trial about Delgado's statements that preceded her invocation of her right to counsel.

**¶7** On appeal, Delgado first argues the state "ignored" the trial court's order suppressing her statement that she had been scratched by her dogs. It is not clear, however, that the court intended to suppress that statement. The court's comments following the hearing were ambiguous, and it later noted that De Leon had complied with its order. But, Delgado is correct that allowing that statement appears inconsistent with the court's decision to suppress Delgado's statement to De Leon that she had not been involved in a fight. As we noted above, the court stated Delgado had been in custody when she made that statement, and that she had not been advised of her rights. A person is entitled to be advised of her rights pursuant to *Miranda* before being subjected to custodial interrogation. *Berkemer v. McCarty*, 468 U.S. 420, 434 (1984); *Miranda*, 384 U.S. at 444; *State v. Pettit*, 194 Ariz. 192, ¶ 13, 979 P.2d 5, 8 (App. 1998). Thus, the court's custody finding would seem to suggest that both pre-advisement statements should have been suppressed.

**¶8** However, regardless whether the trial court intended to suppress Delgado's statement about the source of her injuries, Delgado has forfeited review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601,

607 (2005). Delgado did not argue below that her statement should have been suppressed on *Miranda* grounds, nor did she object when De Leon testified about the statement.[2] Under fundamental error review, Delgado bears the burden to show that the error was both fundamental and prejudicial. *Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607. To show the error was fundamental, Delgado must demonstrate that the error "'go[es] to the foundation of the case, . . . takes from [her] a right essential to h[er] defense, and . . . [is] of such magnitude that [she] could not possibly have received a fair trial.'" *Id.* ¶ 19, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). And to show prejudice in this context, Delgado must show "that a reasonable jury, reviewing the appropriate evidence, could have reached a different result." *State v. Kinney*, 225 Ariz. 550, ¶ 21, 241 P.3d 914, 921 (App. 2010).

**¶9** Delgado has met neither requirement. Although the improper admission of a confession can constitute fundamental error, *see State v. McGilbry*, 96 Ariz. 84, 87-88, 392 P.2d 297, 299 (1964), Delgado has cited no authority suggesting that the improper admission of a facially exculpatory statement by a defendant would necessarily constitute such error. Delgado asserts the state offered her statement "as evidence of guilty knowledge" and dishonesty. But there was far more compelling evidence of those things. Despite her claim to Martinez that she had not been at the victim's house, at least four witnesses, including Delgado's sister, stated she had been present. Moreover, three of those witnesses stated they saw Delgado attack the victim. In light of that evidence, Delgado has not demonstrated any possibility that precluding De Leon's reference to

[2]Although Delgado insists in her reply brief that she raised the issue below "in her motion to suppress," she has not identified where in the record that motion can be found. The hearing below was characterized as a "voluntariness hearing." Generally, "[v]oluntariness and *Miranda* are two separate inquiries." *State v. Montes*, 136 Ariz. 491, 494, 667 P.2d 191, 194 (1983). "[A]n objection on one ground does not preserve the issue on another ground." *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008).

Delgado's explanation for her injuries could have changed the verdicts.

**¶10** Delgado further claims the trial court erred by concluding any of her statements during the interview with Martinez were "unsolicited and spontaneous." She argues that Martinez, instead, "continued to interrogate her" after "her invocation of her right to silence." If an individual indicates that he or she wishes to remain silent, any interrogation must cease. *Miranda*, 384 U.S. at 473-74. But, in her argument, Delgado has not identified any statements she made after she purportedly invoked her right to remain silent. Indeed, she does not explain how or when she invoked her right to remain silent during the interview. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi) (argument on appeal "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on"). The failure to properly develop a claim constitutes waiver; accordingly, we do not address this issue further. *See State v. King*, 226 Ariz. 253, ¶ 11, 245 P.3d 938, 942 (App. 2011).

**¶11** Delgado also asserts that De Leon improperly testified that she had "refused to answer questions," constituting an improper "comment on [her] right to remain silent."[3] Delgado apparently refers to De Leon's testimony that she had not been "forthcoming with information" and that "when I would try to ask questions, she didn't really provide me information." Delgado is correct that the state is prohibited from commenting on a

[3] The state argues Delgado failed to object to De Leon's testimony and that we therefore must review only for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607. Although the state is correct that Delgado did not object, her codefendant objected on the ground that De Leon's testimony was an improper "Fifth Amendment comment." The trial court overruled the objection. Because we find no error in any event, it is not necessary for us to determine whether fundamental error review is appropriate.

defendant's invocation of his or her right to silence. *State v. Ramirez*, 178 Ariz. 116, 125, 871 P.2d 237, 246 (1994). But she cites no authority suggesting that, by being evasive and confrontational in response to De Leon's questions as distinguished from simply remaining silent, she effectively invoked her right to remain silent during that conversation. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *King*, 226 Ariz. 253, ¶ 11, 245 P.3d at 942. In the absence of some words or conduct that could be characterized as an invocation, evidence of such conduct is admissible. *State v. Burns*, 237 Ariz. 1, ¶ 150, 344 P.3d 303, 334 (2015).

**¶12** We affirm Delgado's convictions and sentences.