IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

BRYAN SCOTT GRAFF,
Appellant.

No. 2 CA-CR 2016-0135
Filed June 26, 2017

Appeal from the Superior Court in Pima County
No. CR20151493001
The Honorable Kenneth Lee, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By David A. Simpson, Assistant Attorney General, Phoenix
Counsel for Appellee

Dean Brault, Pima County Legal Defender
By Joy Athena and Jeffrey A. Kautenburger,
Assistant Legal Defenders, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Chief Judge Eckerstrom authored the decision of the Court, in which Presiding Judge Vásquez and Judge Howard[1] concurred.

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

¶1 Bryan Graff appeals from his convictions and sentences for kidnapping and two counts of sexual assault, raising multiple claims of error in his trial and sentencing. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In April 2015 at around 1:00 in the morning, H.A. visited the gentlemen's club where she worked. She was not working that evening and only stayed for a brief time. After she left, she met Graff while walking down the street. She thought Graff looked familiar and was unsure whether or not he was a friend of hers. The two talked briefly, and H.A. then asked Graff if she could stay with him for the night. Graff began trying to kiss H.A. He led her into a dark corner, pushed her against a fence, threw her on the ground, and removed her clothing. He performed oral sex on her and had vaginal intercourse with her, both of which were without her consent. Graff choked her while raping her, beat her, and punched her head into the ground. After twenty-five or thirty minutes, Graff stopped and told

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[1]The Hon. Joseph W. Howard, a retired judge of this court, is called back to active duty to serve on this case pursuant to orders of this court and our supreme court.

H.A. he would take her somewhere to get cleaned up. H.A. ran away from him and into a nearby convenience store.

¶3 Officers with the Tucson Police Department arrived and located Graff nearby. Graff had blood on his face and hands. DNA[2] testing showed that the blood belonged to H.A. Graff's sperm was found in H.A.'s vulva and vagina.

¶4 After a jury trial, Graff was convicted of kidnapping and two counts of sexual assault. He was sentenced to enhanced, maximum, consecutive prison terms totaling eighty-four years. This appeal followed.

DNA Evidence

¶5 Graff first contends the trial court erred when it did not preclude DNA evidence as a sanction for the state's late disclosure of the evidence. We review a trial court's decision on disclosure sanctions for an abuse of discretion. *See Jimenez v. Chavez*, 234 Ariz. 448, ¶ 15, 323 P.3d 731, 734 (App. 2014).

¶6 On December 7, 2015, at a pretrial hearing, the state told the trial court that DNA evidence in the case was forthcoming and would be disclosed as soon as the results were available.[3] On December 14, 2015, Graff filed a motion to preclude the state from presenting DNA evidence at the trial scheduled to begin January 5, 2016. On December 18, the court denied Graff's motion, noting that it would entertain a motion to continue once the results were obtained. On December 29, precisely seven days before the trial began, the state disclosed the DNA results. On January 4, Graff noted

[2]Deoxyribonucleic acid.

[3]At that time, Graff was already aware that samples had been taken for DNA analysis. Furthermore, he has not raised any claim that the state's initial disclosure was inadequate or that the state violated its ongoing duty of disclosure. *See* Ariz. R. Crim. P. 15.1(a); 15.6(a).

his continuing objection to the DNA evidence. The court asked if Graff was requesting a continuance, and Graff declined.

¶7 On appeal, Graff contends the trial court erred in denying his motion to preclude the DNA evidence as a sanction for late disclosure. Graff's contention, however, rests on the premise that the evidence was untimely disclosed. Under Rule 15.6(b), Ariz. R. Crim. P., "[a]ny party that determines additional disclosure may be forthcoming within 30 days of trial shall immediately notify both the court and the other parties of the circumstances and when the disclosure will be available." Graff has not argued that the state failed to comply with this requirement.[4] Rule 15.6(c) provides that "all disclosure required by this rule shall be completed at least seven days prior to trial." The state disclosed the DNA evidence seven days before trial and was therefore in compliance with Rule 15.6(c).[5] Accordingly, the court did not err in denying Graff's motion.

Other-Act Evidence

¶8 Graff next contends the trial court erred in admitting evidence that, on the night of the assault, he approached a strange woman, R.V., and kissed her on her shoulder, claiming the evidence was more prejudicial than probative. He now contends this evidence

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[4]In his reply brief, Graff claims the state failed to comply with Rule 15.6(e), which permits the state to extend the time for disclosure of scientific evidence. But Rule 15.6(e) is not relevant to our analysis.

[5]In *Jimenez*, this court concluded that offering a defendant a continuance was not an appropriate sanction when the state disclosed DNA evidence "less than 24 hours before trial." 234 Ariz. 448, ¶¶ 21-23, 323 P.3d at 736. Contrary to Graff's assertion that the distinction between one day and seven days "is without substantial legal significance," that distinction is key because it is the difference between compliance and non-compliance with Rule 15.6(c). Although Graff claims it is unfair to allow the state to disclose DNA evidence so close to trial, particularly when the state has had the evidence in its possession for months, he has not raised any substantive legal claim on this issue outside of his Rule 15 claim.

should not have been admitted pursuant to Rules 403, 404(b), and 404(c), Ariz. R. Evid. However, at trial, he only objected to the evidence as irrelevant and "more prejudicial than probative."[6] He has therefore forfeited review of his claims pursuant to Rule 404(b) and (c) absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005). As to his Rule 404(b) claim, Graff has not argued the error was fundamental and he has therefore waived the issue on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (2008).

¶9 Rule 404(c) allows the admission of "other crimes, wrongs, or acts" to demonstrate that a defendant has "an aberrant sexual propensity to commit the offense charged." The testimony that Graff kissed R.V. was not admitted as propensity evidence. The state did not argue that the evidence demonstrated an aberrant sexual propensity and the jury was not instructed that it could be considered as such. Accordingly, Rule 404(c) is not applicable here. *Cf. State v. Herrera*, 232 Ariz. 536, ¶ 35, 307 P.3d 103, 116 (App. 2013) (sexual propensity instruction only given if evidence is admitted as propensity evidence).

¶10 Graff's remaining claim is that the evidence was unfairly prejudicial and the trial court should have sustained his objection and excluded it under Rule 403. "Because the trial court is best situated to conduct the Rule 403 balance, we will reverse its ruling only for abuse of discretion." *State v. Cañez*, 202 Ariz. 133, ¶ 61, 42 P.3d 564, 584 (2002), *abrogated in part on other grounds by State v. Valenzuela*, 239 Ariz. 299, n.1, 371 P.3d 627, 631 n.1 (2016). The fact that Graff kissed R.V. on her shoulder was not highly prejudicial. Indeed, the fact that Graff kissed R.V., but did not sexually assault her, may have bolstered his defense that his sexual activity with H.A. had been consensual. Additionally, the court gave the jury a proper limiting instruction on the use of other-act evidence, thereby "mitigating any prejudicial impact." *State v. Leteve*, 237 Ariz. 516, ¶ 17, 354 P.3d 393, 400 (2015).

[6] On appeal, Graff has not argued that the evidence was irrelevant.

We cannot say the court abused its discretion in refusing to exclude the evidence under Rule 403.

Photograph

¶11 Graff next claims the trial court erred in admitting over his objection a photograph that showed the lower half of his nude body, with his hands covering his genitals, because the jury was likely to be prejudiced by the sight of his full-body tattoo. As noted above, we review the trial court's decision to admit this evidence for an abuse of discretion. *Cañez*, 202 Ariz. 133, ¶ 61, 42 P.3d at 584. The photograph showed Graff's visibly red knees, which corroborated H.A.'s story that the assault took place on the ground in a dirt lot. Graff claims this probative value was nonetheless substantially outweighed by the unfair prejudice resulting from the admission of the evidence because he had offered to stipulate that he had red knees and the state rejected this offer. But "[a] trial court maintains discretion in determining whether to exclude evidence, and an offered stipulation is only one factor to consider in that determination." *State v. Coghill*, 216 Ariz. 578, ¶ 38, 169 P.3d 942, 951 (App. 2007).

¶12 The probative value of the photograph was marginal, particularly in light of the offer to stipulate. However, as the state has noted, this particular photograph was not overly prejudicial because several other photographs admitted at trial also showed Graff's tattoos. *Cf. State v. Dunlap*, 187 Ariz. 441, 458, 930 P.2d 518, 535 (App. 1996) (erroneously admitted evidence did not prejudice defendant because evidence was "merely cumulative"). Moreover, our supreme court has noted that "the mere presence of tattoos is not shocking or prejudice-inducing." *State v. Pandeli*, 215 Ariz. 514, ¶ 29, 161 P.3d 557, 568 (2007). Accordingly, we cannot say that the probative value of the photograph was "substantially outweighed" by the danger of unfair prejudice. Ariz. R. Evid. 403. The trial court did not abuse its discretion in admitting the photograph.

Defendant's Right to Be Present

¶13 During the portion of the trial on the aggravating circumstances the state had alleged, Graff "unscrewed the top of the

water pitcher and threw water at" the prosecutor. Graff threw only the water, and not the pitcher it was in, and the water "splashed all over the floor" but did not hit the prosecutor. The court asked Graff's counsel if there was any objection to Graff being removed from the courtroom, and his counsel replied that there was not, stating "I don't think that's going to harm the defendant's interests at this point." Graff was removed from the courtroom for the remainder of the proceedings, including the return of the verdicts on aggravating factors. The court did not offer Graff an opportunity to return. He now contends the trial court erred by denying him his right to be present.[7]

¶14 A defendant has a right to be present during all critical stages of his trial, including reading of the verdicts. *See State v. Levato*, 186 Ariz. 441, 443-44, 924 P.2d 445, 447-48 (1996). In *Illinois v. Allen*, the United States Supreme Court held that a defendant might lose that right if, after he has been warned that disruptive conduct might result in his removal, his conduct is nevertheless "so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom." 397 U.S. 337, 343 (1970). Even when a defendant's conduct is so disruptive as to warrant removal, "the right to be present can . . . be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." *Id.*

¶15 It is uncontested here that the trial court did not warn Graff that his misconduct could lead to removal from the courtroom. The state claims that Graff's act of misconduct was so serious that it warranted removal without warning, claiming Graff "attempted to assault a prosecutor in open court." Courts have allowed unwarned

[7] In some circumstances, a defendant's absence from the courtroom is subject to review for fundamental, prejudicial error. *See State v. Dann*, 205 Ariz. 557, ¶ 56, 74 P.3d 231, 246 (2003). But our supreme court has stated that, in some circumstances, a violation of a defendant's right to be present constitutes structural error. *State v. Garcia-Contreras*, 191 Ariz. 144, ¶ 22, 953 P.2d 536, 541 (1998). Because we conclude no error occurred here, we need not decide which standard applies.

removal of defendants for violent behavior. *See, e.g.*, *State v. Fletcher*, 314 S.E.2d 888, 889-90 (Ga. 1984) (defendant threw counsel table and struggled with detective); *Commonwealth v. Scionti*, 962 N.E.2d 190, 200 (Mass. App. Ct. 2012) (defendant threatened violence if brought into courtroom). But in cases where a defendant's behavior is merely disruptive, a court must warn a defendant before removing him from the courtroom. *See, e.g.*, *Gray v. Moore*, 520 F.3d 616, 621-22 (6th Cir. 2008); *cf. United States v. Lawrence*, 248 F.3d 300, 301-02, 305 (4th Cir. 2001) (defendant's absence without warning violated rule of criminal procedure).

¶16 Here, from the cold record, it is unclear whether Graff's behavior justified a conclusion that removal was necessary for the safety of the courtroom. The water did not hit the prosecutor and the record does not reflect that Graff took any other action against any other person in the room. However, Graff had demonstrated his willingness to take physical action against persons in the courtroom. And a trial court is in the best position to judge a defendant's actions and demeanor and to make the determination whether removal is necessary for the safety of those in the courtroom. *See Allen*, 397 U.S. at 343 ("[T]rial judges confronted with disruptive, contumacious, stubbornly defiant defendants must be given sufficient discretion to meet the circumstances of each case."); *United States v. Shepherd*, 284 F.3d 965, 967 (8th Cir. 2002) (trial court's decision to remove defendant accorded "great deference"), *quoting Scurr v. Moore*, 647 F.2d 854, 858 (8th Cir. 1981). Accordingly, we cannot say the court erred in removing Graff from the courtroom without warning and without providing him an opportunity to return.

¶17 Graff also asserts he is entitled to a new trial on aggravation factors because he was denied an impartial jury, claiming the jury became afraid of him after the incident. Because Graff neither requested a mistrial nor filed a motion for new trial, he has forfeited the right to seek relief for all but fundamental, prejudicial error. *See State v. Payne*, 233 Ariz. 484, ¶ 104, 314 P.3d 1239, 1266 (2013); *cf. State v. Davis*, 226 Ariz. 97, ¶ 12, 244 P.3d 101, 104 (App. 2010) (review of argument raised for the first time in motion for new trial limited to fundamental error).

¶18 In *State v. Jones*, the defendant frequently disrupted the proceedings with "continuing outbursts." 26 Ariz. App. 68, 73, 546 P.2d 45, 50 (1976). After repeated warnings, the defendant was bound and gagged. *Id.* On appeal, he claimed the trial court should have declared a mistrial based on his conduct before the jury. *Id.* This court found no error, concluding that "defendant, by his own actions" had caused the harm, and noting that, if it were to declare a mistrial on that ground, the defendant could ensure his own trial would never begin. *Id.* at 73-74, 546 P.2d at 50-51; *cf. State v. Granados*, 235 Ariz. 321, ¶ 21, 332 P.3d 68, 74 (App. 2014) ("A defendant's own self-prejudicing conduct which precipitates lawful repercussions simply does not create the appearance of bias in the judge."). Because any potential prejudice in the jury was brought about by Graff's own actions, we will not allow him to be rewarded on appeal for his own misconduct. Graff is not entitled to a new trial on this basis and the court did not fundamentally err in not granting one sua sponte.

Aggravating Factors

Sufficiency of Evidence

¶19 Graff next argues some aggravating factors found by the jury were not supported by sufficient evidence. Although he did not challenge the sufficiency of the evidence below, and our review is therefore limited to fundamental error, insufficient evidence constitutes fundamental error. *See State v. Fimbres*, 222 Ariz. 293, n.1, 213 P.3d 1020, 1024 n.1 (App. 2009).

¶20 A jury's finding of an aggravating factor must be supported by "substantial evidence," that is, "more than a mere scintilla and is such proof that reasonable persons could accept as adequate and sufficient to support a conclusion of defendant's guilt beyond a reasonable doubt." *State v. Roseberry*, 210 Ariz. 360, ¶ 45, 111 P.3d 402, 410-11 (2005), *quoting State v. Mathers*, 165 Ariz. 64, 67, 796 P.2d 866, 869 (1990). In determining whether sufficient evidence exists, we view the facts in the light most favorable to upholding the jury's verdict. *Id.*

¶21 Graff first contends the evidence did not support a finding of financial harm to H.A., claiming "[t]he basis for this factor

was the victim's loss of her job[] [b]ut . . . her job loss could have occurred for other reasons." But even assuming arguendo that H.A. lost her job for reasons unrelated to the assault, she testified that she was not able to work for a month following the attack, which is sufficient to demonstrate financial harm. Additionally, photographs of H.A.'s injuries show bruises and abrasions to her face and body that would have affected her ability to make money as a cabaret dancer. The jury's finding of financial harm was supported by sufficient evidence.

¶22 Graff next claims the evidence was insufficient to support the aggravating factor that he "threatened to inflict serious physical injury." *See* A.R.S. § 13-701(D)(1). "Serious physical injury" is defined as "physical injury that creates a reasonable risk of death, or that causes serious and permanent disfigurement, [or] serious impairment of health." A.R.S. § 13-105(39). The evidence showed Graff choked H.A. four times and beat her so badly that she lost consciousness three or four times. Based on common sense and experience, reasonable jurors could conclude that such conduct threatened the infliction of serious physical injury because it created a reasonable risk of death. *See State v. Aguilar*, 169 Ariz. 180, 182, 818 P.2d 165, 167 (App. 1991). There was, therefore, sufficient evidence to support the jury's finding on this aggravating factor.

¶23 Graff finally contends that the state presented insufficient evidence that the crime was "done in an especially heinous manner" and "done in an especially depraved manner." *See* A.R.S. § 13-701(D)(5). In *State v. Murdaugh*, our supreme court listed a five-factor test for determining whether a crime is "especially heinous or depraved." 209 Ariz. 19, ¶ 59, 97 P.3d 844, 856 (2004). These factors include "whether the defendant relished the [crime]," whether the crime involved gratuitous violence, whether the victim was needlessly mutilated, if the crime was senseless, and if the victim was helpless. *Id.* These factors are focused on "the defendant's state of mind." *Id.* Graff contends the evidence is insufficient because there was no testimony as to his state of mind. As this court has observed, "a defendant's state of mind 'is seldom, if ever, susceptible of proof by direct evidence.'" *State v. Harm*, 236 Ariz. 402, ¶ 13, 340 P.3d 1110, 1114 (App. 2015), *quoting State v. Lester*, 11 Ariz. App. 408, 410, 464

P.2d 995, 997 (1970). But it may be shown by circumstantial evidence. *Id.* Again, Graff brutally beat H.A. And, he looked into her eyes and told her, "I am going to do every single thing to you that I can possibly do." This was sufficient evidence to demonstrate the depraved and heinous nature of his acts for the purposes of a non-capital underlying offense.

Weight of Aggravation

¶24 Graff next asserts the trial court erred in weighing the aggravating factors. He claims the court improperly counted physical harm, emotional harm, and financial harm as separate aggravating factors, rather than one unified factor. *See* A.R.S. § 13-701(D)(9). He likewise asserts that the heinous, cruel, or depraved nature of the crime should have been regarded as one aggravating factor, rather than three. *See* A.R.S. § 13-701(D)(5).

¶25 We need not address this argument because Graff has not established fundamental error. Graff is correct that an illegal sentence constitutes fundamental error. *See State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002). But even assuming arguendo that Graff is correct in his assertion that all these findings should have been considered two aggravating factors, rather than six, that was still sufficient to allow the court to impose an aggravated sentence. *See* A.R.S. § 13-701(C); *cf. State v. Munninger*, 213 Ariz. 393, ¶ 13, 142 P.3d 701, 705 (App. 2006) (use of improper aggravating factor not fundamental error). [8] Moreover, because the court imposed a maximum sentence, rather than an aggravated sentence, the imposition of that sentence only required the court to find a single aggravating factor. *See* A.R.S. §§ 13-1406(B); 13-703(D), (J); 13-701(C).

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[8] *State v. Trujillo*, which Graff relies upon, is distinguishable because in that case, the court improperly relied upon the defendant's lack of remorse and failure to admit guilt, thereby "depriv[ing] him of a right essential to his defense." 227 Ariz. 314, ¶ 15, 257 P.3d 1194, 1198 (App. 2011). The finding that the error was fundamental rested on the deprivation of the defendant's Fifth Amendment right. *Id.* Any error here does not implicate Graff's constitutional rights.

The sentence imposed by the trial court was not illegal and did not constitute fundamental error.

Competency

¶26 Graff next contends the trial court erred in denying his written motion, submitted post trial but prior to sentencing, for a competency evaluation pursuant to Rule 11, Ariz. R. Crim. P. "We review a trial court's decision on whether to order an examination and competency hearing for abuse of discretion." *State v. Mendoza-Tapia*, 229 Ariz. 224, ¶ 22, 273 P.3d 676, 683 (App. 2012).

¶27 In his motion for evaluation, Graff primarily relied on the water-throwing incident as evidence of his incompetence. As our supreme court has noted, "[v]olatility . . . should not 'be equated with mental incompetence to stand trial.'" *State v. Delahanty*, 226 Ariz. 502, ¶ 11, 250 P.3d 1131, 1134 (2011), *quoting Burket v. Angelone*, 208 F.3d 172, 192 (4th Cir. 2000). In determining whether a defendant is competent, "[t]he inquiry is whether defendant 'has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether he has a rational as well as a factual understanding of the proceedings against him.'" *State v. Amaya-Ruiz*, 166 Ariz. 152, 161-62, 800 P.2d 1260, 1269-70 (1990), *quoting Dusky v. United States*, 362 U.S. 402, 403 (1960). Graff did not make any showing that he was incapable of assisting in his defense or understanding the proceedings against him. The court did not abuse its discretion in denying his motion for competency evaluation.

Mental Health Evaluation

¶28 Graff's final claim is that the trial court erred in denying his motion for mental health evaluation pursuant to Rule 26.5, Ariz. R. Crim. P. We review the trial court's denial of this request for an abuse of discretion. *See State v. Williams*, 183 Ariz. 368, 381, 904 P.2d 437, 450 (1995).

¶29 In *Williams*, our supreme court noted that "we have found an abuse of discretion only when the record before the trial court indicated that a presentence mental health exam may well have produced additional evidence supporting mitigation." *Id.* Although

Graff claims a psychosocial evaluation "contained bases for further examination," he has not included that evaluation in the record on appeal or explained what those bases might be. Accordingly, he has not shown that the trial court abused its discretion in denying his motion for evaluation.

Disposition

¶30 For the foregoing reasons, we affirm Graff's convictions and sentences.