IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MARVIN ARIDO-SORRO,
Appellant.

No. 2 CA-CR 2016-0366
Filed October 13, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.24.

Appeal from the Superior Court in Pima County
No. CR20152545001
The Honorable Jane L. Eikleberry, Judge

AFFIRMED AS MODIFIED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel, Phoenix
By Diane Leigh Hunt, Assistant Attorney General, Tucson
Counsel for Appellee

Joel Feinman, Pima County Public Defender
By David J. Euchner, Assistant Public Defender, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Staring authored the decision of the Court, in which Judge Espinosa and Judge Howard[1] concurred.

S T A R I N G, Presiding Judge:

¶1 Marvin Arido-Sorro appeals his convictions and sentences arising from the June 2015 assault of his girlfriend, M.M. He argues the trial court committed fundamental error by allowing the introduction of evidence collected during a warrantless search of his home, testimony that he had objected to the search and invoked his right to remain silent, and statements he made after an investigating officer "goaded him into custodial interrogation" after he had invoked his *Miranda*[2] rights. Arido-Sorro also contends the trial court erred in sentencing him on count four of the indictment, sentencing him for a class 3 felony when the correct designation was a class 4 felony. For the reasons that follow, we affirm his convictions and sentences, as modified to correct the sentencing error on count four.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to affirming Arido-Sorro's convictions. *State v. Causbie*, 241 Ariz. 173, ¶ 2, 384 P.3d 1253, 1255 (App. 2016). In June 2015, Arido-Sorro and M.M. were at the home they shared. Arido-Sorro awoke M.M. and physically assaulted her by grabbing her by the hair and neck, punching her, dragging her down a flight of stairs, and hitting her with a frying pan and a metal food strainer. M.M. escaped through the back door, but Arido-Sorro caught her and continued to assault her. M.M.'s injuries

[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.

[2]*Miranda v. Arizona*, 384 U.S. 436, 474 (1966).

included an eye-socket (orbital-bone) fracture and two facial lacerations.

¶3 Two neighbors, D. and M., awoke to hear M.M. screaming, and observed Arido-Sorro stomping on her head. D. intervened, stopping the assault, and M. brought M.M. inside the neighbors' home and called 9-1-1. Police arrived and detained Arido-Sorro.

¶4 Arido-Sorro was charged with one count of aggravated assault by strangulation, two counts of aggravated assault with a dangerous instrument, and one count of aggravated assault by causing serious physical injury, which was later amended to aggravated assault causing substantial but temporary disfigurement. The jury acquitted him on the strangulation charge but found him guilty of the lesser-included offense of simple assault, and found him guilty on the other three charges. The trial court sentenced him to concurrent, presumptive prison sentences, the longest of which is 7.5 years.

¶5 This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, 13-4033(A)(1), (4).

Warrantless Search

¶6 On appeal, Arido-Sorro argues the trial court committed fundamental error by allowing the state to introduce evidence collected during a warrantless search of the residence he shared with M.M. The evidence in question included photographs of blood smeared around the home and braided hair extensions pulled from M.M.'s head, as well as the frying pan and metal strainer with which Arido-Sorro struck her. Because Arido-Sorro did not object to this evidence below, we review only for fundamental, prejudicial error. *State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (arguments not raised below reviewable on appeal only for fundamental, prejudicial error); *see also State v. Newell*, 212 Ariz. 389, ¶ 34, 132 P.3d 833, 842 (2006) ("We may . . . review a suppression argument that is raised for the first time on appeal for fundamental error."); *State v. Kinney*, 225 Ariz. 550, ¶ 11, 241 P.3d 914, 919

(App. 2010) (suppression argument not raised below reviewed for fundamental error).[3]

¶7 The Fourth Amendment prohibits unreasonable searches and seizures. U.S. Const. amend. IV; *State v. Gilstrap*, 235 Ariz. 296, ¶ 7, 332 P.3d 43, 44 (2014). Evidence seized as a result of an unreasonable search is generally suppressed, *State v. Allen*, 216 Ariz. 320, ¶ 9, 166 P.3d 111, 114 (App. 2007), and "warrantless searches are presumptively unreasonable," *Rodriguez v. Arellano*, 194 Ariz. 211, ¶ 9, 979 P.2d 539, 542 (App. 1999).

¶8 A recognized exception to the warrant requirement is the "protective sweep" of hidden areas "immediately adjoining the place of arrest from which an attack could be immediately launched." *State v. Fisher*, 226 Ariz. 563, ¶ 8, 250 P.3d 1192, 1194 (2011), *quoting Maryland v. Buie*, 494 U.S. 325, 334 (1990). To search beyond that area requires "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing danger to those on the arrest scene." *Id.*, *quoting Buie*, 494 U.S. at 334.

¶9 Here, the evidence indicates officers arrived on scene, and briefly spoke with M.M. at the neighbors' home. During that conversation, she was on the floor, bleeding from her head and mouth, and her voice "was very low and in and out." Officers proceeded to the adjacent residence M.M. shared with Arido-Sorro. Through the front window, and before entering the home, they observed clear indications of a violent incident, including overturned furniture, blood on the floor and walls, and that the rear sliding glass door "was wide open." The state of the home, as well as M.M.'s

[3] The state argues we should decline to review suppression issues Arido-Sorro did not raise in the trial court. *See State v. Brita*, 158 Ariz. 121, 124, 761 P.2d 1025, 1028 (1988) ("It is highly undesirable to attempt to resolve issues for the first time on appeal, particularly when the record below was made with no thought in mind of the legal issue to be decided."). In this instance, however, the record is sufficiently developed to permit review for fundamental error.

condition while speaking with officers, including the severity of her injuries and her affect, supported a reasonable belief that the residence might contain "an individual posing danger to those on the arrest scene." *See id.*, *quoting Buie*, 494 U.S. at 334. Moreover, "[c]ourts must be careful not to use hindsight in limiting the ability of police officers to protect themselves as they carry out missions which routinely incorporate danger." *United States v. Astorga-Torres*, 682 F.2d 1331, 1335 (9th Cir. 1982), *quoting United States v. Coates*, 495 F.2d 160, 165 (D.C. Cir. 1974); *cf. State v. Manuel*, 229 Ariz. 1, ¶ 11, 270 P.3d 828, 831 (2011) (in reviewing denial of motion to suppress we "view[] the facts in the light most favorable to sustaining the ruling"). Thus, Arido-Sorro's assertion that officers must have known there was no one inside the residence is unavailing, as it relies on a hindsight determination not consistent with the initial evidence at the scene and officer-safety concerns underlying the protective-sweep warrant exception. We conclude the warrantless entry into M.M.'s and Arido-Sorro's home was permissible as a protective sweep, and the trial court did not commit fundamental error in allowing the state to present evidence collected there.

Alleged Violation of Right to Remain Silent

¶10 Arido-Sorro next argues the trial court erred by not excluding statements he made after he invoked his right to counsel. Because he did not object on this basis at trial, we review for fundamental, prejudicial error. *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683-84 (App. 2008) (objection on one ground does not preserve issue on another ground; incomplete objections reviewed "solely for fundamental error").

¶11 When a detained suspect invokes the right to remain silent or speak with a lawyer, all questioning must stop. *Edwards v. Arizona*, 451 U.S. 477, 482 (1981); *Miranda v. Arizona*, 384 U.S. 436, 474 (1966). But a detainee may waive his rights by "initiat[ing] further communication, exchanges, or conversations with the police." *Edwards*, 451 U.S. at 484-85. Such a waiver does not occur where a detained suspect responds to "express questioning or its functional equivalent," meaning "any words or actions . . . police should know are reasonably likely to elicit an incriminating response." *Rhode Island v. Innis*, 446 U.S. 291, 300-01 (1980); *see also State v. Jones*, 203 Ariz. 1,

¶ 15, 49 P.3d 273, 278 (2002). Examples of persuasive tactics that are equivalent to interrogation despite the lack of any express questioning include deemphasizing "the moral seriousness of the offense," "cast[ing] blame on the victim or on society," suggesting "legal excuses" to induce a confession, using coached witnesses to accuse the detainee of fictitious crimes, and equating a suspect's silence with evidence of guilt. *Miranda*, 384 U.S. at 450-51, 453-54; *see also Innis*, 446 U.S. at 299. However, interrogation does not occur when a suspect's statements are "the unforeseeable results of [officers'] words or actions," such as when a suspect overhears a brief conversation between officers before voluntarily divulging the location of missing evidence. *Innis*, 446 U.S. at 295, 301-02.

¶12 In this instance, Arido-Sorro had been detained and invoked his right to remain silent. As officers returned from conducting the protective sweep, he interrupted two officers' conversation to assert that the entry into the residence had violated his rights. One officer responded that they "were doing a welfare check . . . [and] didn't violate his rights." Arido-Sorro then requested the officer's badge number and purported to threaten the officer's job. The officer commented that Arido-Sorro "was not a tough guy for beating his girlfriend," and Arido-Sorro responded by saying, "[Y]ou're lucky she's even still here, and . . . when I get out I'm going to kill her and you won't be able to talk to her then." After the officer "told him he shouldn't make statements like that," Arido-Sorro added, "you will see . . . when she's gone nobody will be able to see her."

¶13 We conclude that no actual questioning occurred in the above exchange, which Arido-Sorro initiated, including by threatening the officer's job. The officer's comment concerning Arido-Sorro not being "a tough guy for beating his girlfriend," occurred after Arido-Sorro had reinitiated communication. This exchange is far removed from the "psychological ploys" catalogued in *Miranda*, 384 U.S. at 450-54, 457, and is more like the uninvited and "unforeseeable" response described in *Innis*, 446 U.S. at 295, 301-02.[4]

[4]The facts of *Innis* are illuminating. There, in the presence of a murder suspect who had invoked his rights, officers discussed among

Accordingly, we reject Arido-Sorro's contention that he was "goaded . . . into a custodial interrogation," and conclude the trial court did not err in allowing testimony about his post-*Miranda* statements.

Evidence of Assertion of Fourth Amendment Rights

¶14 Arido-Sorro argues, also for the first time on appeal, that his rights were violated because testimony was introduced at trial that he had objected to the warrantless search of his home. We review for fundamental, prejudicial error. *Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d at 683-84.[5]

¶15 A defendant is deprived of due process when invocation of Fourth Amendment rights is used as evidence of guilt. *State v. Stevens*, 228 Ariz. 411, ¶¶ 13-16, 267 P.3d 1203, 1208-09 (App. 2012). Evidence of "a defendant's invocation of constitutional rights is probative of nothing except the defendant's awareness of [those] rights." *State v. Palenkas*, 188 Ariz. 201, 212, 933 P.2d 1269, 1280 (App. 1996). However, although the admission of such evidence may be fundamental error, it is not necessarily prejudicial. *See Stevens*,

---

themselves the potential for tragedy if a child from a nearby school for handicapped children were to find the murder weapon, a shotgun. *Innis*, 446 U.S. at 294-95. Overhearing them, the suspect disclosed its location. *Id.* at 295. The Court concluded the officers' conversation was neither an interrogation nor "reasonably likely to elicit an incriminating response." *Id.* at 302-03.

[5]Arido-Sorro also alleges error resulted from the admission of testimony he elicited concerning his assertion of his right to remain silent. He contends he elicited this testimony in response to the state's introduction of evidence that he objected to the search, but he makes no attempt to explain how it related to the state's evidence, or what he hoped to accomplish. His reliance on *State v. Lindsey*, 149 Ariz. 472, 477, 720 P.2d 73, 78 (1986), is misplaced because he did not object to the state's evidence and thus was not forced to change his strategy in response to "erroneously admitted testimony." We agree with the state that the invited-error doctrine precludes relief. *See State v. Logan*, 200 Ariz. 564, ¶ 9, 30 P.3d 631, 632-33 (2001).

228 Ariz. 411, ¶¶ 16-18, 267 P.3d at 1209 (evidence defendant objected to search prejudicial only as to conviction relating to drugs found in co-resident's bedroom). Further, evidence a suspect objected to a search can be introduced for purposes other than as evidence of guilt. *Id.* ¶ 15 & n.7.

¶16 Here, the state argues Arido-Sorro's objection to the search of his home was introduced to provide context for his threats to harm M.M. We agree. Arido-Sorro's objection was the impetus for the exchange with the officer that culminated in Arido-Sorro threatening to kill M.M. And, significantly, the state did not refer to Arido-Sorro's objection in its opening statement or closing argument. Because the testimony that Arido-Sorro objected to the search was not introduced as evidence of guilt, the trial court did not err in allowing it.[6]

Sentencing

¶17 On count four, Arido-Sorro was originally charged with aggravated assault resulting in serious physical injury, a class three

[6]Additionally, even where error occurs, prejudice is determined "in light of the entire record." *State v. Thomas*, 130 Ariz. 432, 436, 636 P.2d 1214, 1218 (1981). Reversal for erroneous admission of evidence is not required unless "absent the inadmissible evidence, and applying the appropriate standard of proof, the jury could have reached a different result." *State v. Escalante*, 242 Ariz. 375, ¶ 40, 396 P.3d 611, 620 (App. 2017). Here, the evidence of Arido-Sorro's guilt was overwhelming and included not only M.M.'s testimony and photographs of her injuries, but also the testimony of two neighbors who observed him standing over M.M. and stomping on her head. Thus, even if Arido-Sorro were able to establish error with respect to the admission of evidence that he had objected to the search, it would not have significantly affected the verdict in light of the weight of the remaining evidence. *See id.*; *cf. State v. Roscoe*, 145 Ariz. 212, 223, 700 P.2d 1312, 1323 (1984) (autopsy photographs "not gruesome enough to create a risk of inflaming the jury . . . when the crime committed was so atrocious that photographs could add little to the repugnance felt by anyone who heard the testimony").

felony, but the trial court amended the charge to aggravated assault resulting in temporary substantial disfigurement, a class four felony. A.R.S. § 13-1204(A)(1), (3), (E). The court did not, however, change the indictment to reflect amendment to a class four felony, and ultimately imposed 3.5 years' imprisonment, the presumptive sentence for a class three felony. A.R.S. § 13-702(D). Arido-Sorro argues the court erred by sentencing him to the term for a class three felony when the offense was actually a class four, with a presumptive term of 2.5 years' imprisonment. *See id.*

¶18 Arido-Sorro has neither identified the standard of review nor argued that this was fundamental error, circumstances that ordinarily allow this court to conclude a claim has been waived on appeal. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008). Nevertheless, "[i]mposition of an illegal sentence constitutes fundamental error." *State v. Joyner*, 215 Ariz. 134, ¶ 5, 158 P.3d 263, 266 (App. 2007), *quoting State v. Thues*, 203 Ariz. 339, ¶ 4, 54 P.3d 368, 369 (App. 2002) (alteration in *Joyner*). "Although we do not search the record for fundamental error, we will not ignore it when we find it." *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007). And, in this case, the state has conceded that fundamental error occurred and that the court should amend the sentence pursuant to A.R.S. § 13-4037(A), which requires an appellate court to correct "an illegal sentence . . . imposed upon a lawful verdict."

Disposition

¶19 For the foregoing reasons, we affirm Arido-Sorro's convictions and sentences, with the exception that we modify his sentence on count four to a term of 2.5 years' imprisonment.