IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

SAMON OLAMARR SMITH,
Appellant.

No. 2 CA-CR 2018-0211
Filed December 20, 2019

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NOT FOR PUBLICATION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. 31.19(e).

Appeal from the Superior Court in Pinal County
No. S1100CR201703448
The Honorable Jason R. Holmberg, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Alexander Taber, Assistant Attorney General, Tucson
Counsel for Appellee

Rosemary Gordon Pánuco, Tucson
Counsel for Appellant

MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 Samon Smith appeals from his convictions and sentences for twenty-two counts of aggravated assault, one count of disorderly conduct, and two counts of discharging a firearm at a non-residential structure. He argues there was insufficient evidence to support five of the aggravated assault convictions and the trial court erred in admitting certain evidence. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts. *State v. Gunches*, 225 Ariz. 22, n.1 (2010). In May 2017, Smith learned that D.W. was posting negative comments about him on social media. Smith felt "disrespected" and responded in kind, leading to an "aggressive" hours-long back-and-forth between them. The two eventually decided to fight one another in person, and D.W. challenged Smith to meet him at the Coolidge Youth Center.

¶3 Smith made arrangements to go to the Center with a group of people, among them Jaida T. Smith also discussed his plans with his girlfriend, who urged him not to go. In text messages, she said "leave it alone," but Smith responded, "I got some for them." Smith's girlfriend then asked, "You got your pistol on you?" and he responded by sending a picture of a handgun.

¶4 Around 5:00 p.m., Smith and his group arrived at the Center. Smith got out of the car, walked to the front doors, and motioned to D.W. who was inside. D.W. came out and confronted Smith, who had removed his shirt. The two then began a fistfight in the street in front of the Center. A large crowd gathered to watch. Some looked on from inside the Center, while others, including D.V., A.D., F.J., and M.M., came outside to watch. Meanwhile, Jaida went to the car the group had arrived in, retrieved a handgun, and then handed it to Smith, who pointed it in the air and fired.

Smith then aimed the gun at the Center and fired toward the remaining crowd. Another occupant of the car, who had traveled to the Center with Smith, also fired a handgun.[1]

¶5 When Smith started firing his gun, the crowd outside and people inside the Center began running and taking cover. Some hid behind a car in front of the Center, others ran behind a metal beam, some fled through the Center to the back, and some ran into Center rooms for protection from the gunfire. People were falling to the ground and pushing each other through the front doors as they ran away.

¶6 After the shooting, Smith and the group he had arrived with got back in their vehicle and fled the scene but were stopped by police a few minutes later. Inside the car, police found two guns: a Llama nine-millimeter handgun and a Raven .25-caliber handgun. The nine-millimeter gun resembled the one depicted in the picture Smith had sent to his girlfriend before the shooting. Forensic testing linked both guns to twelve shell casings and three bullet fragments found at the Center.

¶7 Smith was charged with twenty-six counts of aggravated assault with a deadly weapon or dangerous instrument, one count of conspiracy to commit aggravated assault, one count of disorderly conduct, two counts of discharging a firearm at a non-residential structure, one count of assisting in a criminal street gang, and one count of misconduct involving weapons. The conspiracy count was dismissed without prejudice before trial, and the weapons misconduct charge was severed from the remaining charges.

¶8 After a nine-day trial, a jury convicted Smith as outlined above. The trial court sentenced him to a combination of concurrent and consecutive terms of imprisonment, totaling thirty-eight years. We have jurisdiction over Smith's appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Motion for Judgment of Acquittal

¶9 Following the close of the state's evidence, Smith moved for a judgment of acquittal on all counts pursuant to Arizona Rule of Criminal

[1]Rollin Johnson was tried and convicted separately from Smith; his convictions and sentences were affirmed on appeal. *State v. Johnson*, No. 2 CA-CR 2018-0253 (Ariz. App. May 29, 2019) (mem. decision).

Procedure 20. The trial court dismissed with prejudice four counts of aggravated assault, but denied the motion on the remaining counts. Smith now challenges his convictions and sentences for the five aggravated assault counts related to victims A.D., F.J., D.V., M.M., and D.W., claiming the court erred in denying his motion as to these counts.

¶10 We review de novo a trial court's ruling on a Rule 20 motion. *State v. West*, 226 Ariz. 559, ¶ 15 (2011). Pursuant to that rule, after the close of evidence, "the court must enter a judgment of acquittal on any offense charged in an indictment . . . if there is no substantial evidence to support a conviction." Ariz. R. Crim. P. 20(a)(1). Substantial evidence is that which a reasonable juror could accept as sufficient to support a conclusion of guilt beyond a reasonable doubt. *State v. Fulminante*, 193 Ariz. 485, ¶ 24 (1999). On appeal, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Cox*, 214 Ariz. 518, ¶ 8 (App. 2007) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶11 To prove Smith committed aggravated assault against A.D., F.J., D.V., M.M., and D.W., the state was required to demonstrate he placed them "in reasonable apprehension of imminent physical injury" using a deadly weapon or other dangerous instrument. A.R.S. §§ 13-1203(A)(2), 13-1204(A)(2); *see also State v. Morgan*, 128 Ariz. 362, 367 (App. 1981). Smith argues there was insufficient evidence because there was no testimony by these five victims, who did not testify, "that they were in fact [on the scene], realized what was going on, and were in 'reasonable apprehension of imminent physical injury.'" He thus reasons "there was no way to know" if this element of proof was met.

¶12 On the contrary, however, a victim need not testify to actual fright to establish an assault conviction. *State v. Wood*, 180 Ariz. 53, 66 (1994); *State v. Valdez*, 160 Ariz. 9, 11 (1989) ("When fear or apprehension are elements of an offense, testimony of the victim that he was actually afraid or apprehensive is not required; that element of the crime can be established by circumstantial evidence."). Although the five victims did not testify, the video recording and still photographs from the shooting are circumstantial evidence of each victim's state of mind during the shooting. *See State v. Bible*, 175 Ariz. 549, 560 n.1 (1993) (There is "no distinction between the probative value of direct and circumstantial evidence."). Detective Fuller verified the identity of each victim in the video and photos at trial. D.W. was shown running away from the street and taking cover

behind a steel beam. D.V. could be seen running to the front doors and into the Center. M.M. ducked down and took cover behind a vehicle that was struck by two bullets. And still photographs showed A.D. and F.J. running from the front of the Center into the building. Additionally, two witnesses testified that A.D. and F.J. both looked scared immediately after the incident. Thus, there was sufficient evidence from which any rational juror could conclude beyond a reasonable doubt that the five victims had been placed in reasonable apprehension of imminent physical injury from Smith pointing and firing a handgun in their immediate vicinity. *See Cox*, 214 Ariz. 518, ¶ 8. The trial court did not err in denying Smith's Rule 20 motion on these five charges.

Admission of Evidence

¶13 Smith next argues the trial court made numerous evidentiary errors. When an issue has been properly preserved at trial, we review the court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Gill*, 242 Ariz. 1, ¶ 7 (2017). But where a defendant has failed to raise an alleged trial error for consideration by the trial court, we are limited to fundamental-error review. *State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005); *State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018).

Exhibit 646

¶14 Smith first challenges the admission of Exhibit 646, the report from the state's ballistics expert, Joey Fimbres, which included photographs and notes he took about what he was doing and observing in the course of his work. Without identifying any particular portion of the report, Smith asserts "[m]uch of the information contained in the report was clearly hearsay." Smith concedes our review is limited to fundamental error, however, because he did not raise this argument below. Smith bears the burden of demonstrating any error was fundamental because it (1) went to the foundation of the case, (2) took from him a right essential to his defense, or (3) was so egregious that he could not possibly have received a fair trial. *Escalante*, 245 Ariz. 135, ¶ 21. If he establishes fundamental error under either of the first two prongs, he must make a separate showing of prejudice. *Id.*

¶15 Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted in the statement," which is generally inadmissible. Ariz. R. Evid. 801, 802. The state argues the report was not hearsay and was admissible "for the limited purpose of showing the basis

for Fimbres's conclusions that the handguns located in the car Smith was taken from matched the shell casings and bullet fragments found at the Center."

¶16 Smith does not explain how the admission of the report was fundamental error, but asserts he was prejudiced because it "introduced a lot of prejudicial hearsay beyond the conclusions that the expert witness testified to" and "invited the jury to rely on the information and pictures in the report to draw conclusions contrary to the expert's testimony." The report, however, contained little information not included in Fimbres's testimony, and Smith identifies no information from which the jury could draw "contrary" conclusions. Fimbres testified that he linked the shell casings found at the Center to the two guns recovered from the vehicle Smith was found in and explained his methods for doing so, referring to some of the photographs in the report, which contained the same information. The only additional material in the report was several pages of handwritten and typed notes about the testing methods employed, the chain of custody, and photographs of the items tested. Because there was no meaningful difference between Fimbres's testimony at trial and his statements in the report that could have had an impact on the jury, Smith has demonstrated no prejudice from the report's admission. *See State v. Foshay*, 239 Ariz. 271, ¶¶ 24-25 (App. 2016) (no prejudice where ballistic expert's report "was largely repetitive" of his trial testimony and the difference between the report and testimony "would not have made a practical difference to the jury").

Exhibit 9

¶17 Smith next contends the trial court abused its discretion by admitting Exhibit 9, a "large poster board" chart containing twenty photographs from the surveillance video identifying the victims. Smith objected to its admission as cumulative, asserting "we already have all of these photographs in evidence," they "are duplicates of pictures [the jury] already have . . . from the video which they have," and the photographs are "out of context of all the other things that were going on." Exhibit 9 was admitted over Smith's objection.

¶18 Citing *United States v. Wood*, 943 F.2d 1048, 1053 (9th Cir. 1991), Smith now argues Exhibit 9 was inadmissible as "a ped[ago]gical device because it consisted of pictures and information that had already been presented" and does not "meet the requirements" of a "summary, chart, or calculation" under Arizona Rule of Evidence 1006 "because all of

the pictures were already in evidence." Smith's objections below did not preserve this argument on appeal; we therefore review this claim only for fundamental, prejudicial error. *See State v. Moody*, 208 Ariz. 424, ¶ 120 (2004) (absent fundamental error, objections on grounds different from those raised to trial court are waived). Smith contends admission of Exhibit 9 "deprived [him] of a fair trial" because it "functioned like a mini version of the [s]tate's closing argument" and "invited the jury to convict *en masse* without considering whether sufficient evidence had been presented for each individual count."

¶19 In *United States v. Wood*, the Ninth Circuit upheld the district court's refusal to admit an expert's charts into evidence, reasoning that "charts or summaries of testimony or documents already admitted into evidence are merely pedagogical devices, and are not evidence themselves." 943 F.2d 1048, 1053-54. But the court also cited *United States v. Poschwatta*, 829 F.2d 1477, 1481 (9th Cir. 1987), which held that "[a]lthough the better practice may have been for the court to allow the charts to be used as testimonial aids only," it did not abuse its discretion by admitting them. 943 F.2d at 1054. Thus, Smith's argument that pedagogical devices are impermissible is not supported by the case law he cites.

¶20 Further, Smith has not demonstrated Exhibit 9 was a pedagogical device. The exhibit was admitted during a detective's testimony to identify the names and ages of some of the victims, and was not referenced in closing argument. Most importantly, any conceivable error in the trial court's admission of Exhibit 9 was harmless because, as Smith acknowledges, the chart was merely cumulative of photographs and videos already in evidence. *See State v. Williams*, 133 Ariz. 220, 226 (1982) (erroneous admission of evidence which was merely cumulative constitutes harmless error). And, jurors were instructed that the state bore the burden of proving guilt beyond a reasonable doubt and that each count was to be decided separately; we presume the jury followed those instructions. *See State v. Newell*, 212 Ariz. 389, ¶ 68 (2006). Undercutting Smith's argument, the prosecutor addressed the elements of the offense for each victim individually, rather than "*en masse*" as he claims. Accordingly, Smith has not demonstrated the admission of Exhibit 9 was error, let alone fundamental error.

Exhibit 639

¶21 On the fourth day of trial, the state offered Exhibit 639, the body-camera footage of one responding officer to show the reluctance of

some victims to speak to police about officers' suspicions that the shooting was "gang motivated." Smith's counsel objected to the relevance of the exhibit, arguing the state "cannot link these two individuals to either my client or as far as I know, to any particular gang at all . . . So just because some people are reluctant to testify for whatever reason after the fact, what's that got to do with my client." The trial court overruled the objection, and Exhibit 639 was admitted.

¶22 On appeal, Smith contends the trial court failed to balance "whether the probative value of [the] video . . . outweighed its unfair prejudice and ability to mislead the jury." Because he objected only to the video's admission on relevance grounds, Smith has waived all but fundamental-error review of this argument. *See Moody*, 208 Ariz. 424, ¶ 120. And because he has failed to argue the admission of the video amounted to fundamental, prejudicial error, Smith has waived the argument entirely. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (failure to allege error is fundamental waives argument). In any event, notwithstanding waiver, Smith's argument that the exhibit was prejudicial for allowing the jury to "speculate that it must have been the gang involvement that motivated the people to no[t] cooperate," is enervated by the jury's acquittal on the gang charge.

Exhibit 621

¶23 On the sixth day of trial, the state offered Exhibit 621, a cell phone video of Smith and D.W.'s fight outside the Center. Smith objected to the audio portion of the video "because there's all sorts of talking going on in the background" from unidentified sources that have "nothing to do with the issues." The state argued it was not offering any statements for their truth, but the audio was relevant to hear Smith gasping for air, supporting the theory that he was losing the fight and thus felt he needed the gun. The exhibit was admitted, but before it was played, the trial court instructed the jurors they were to disregard any remarks they heard on the video.[2]

¶24 On appeal, Smith does not repeat his relevance challenge to the audio portion of the video, but argues the audio "was too prejudicial to be admitted into evidence" due to "the comments made in the background," citing Rule 403, Ariz. R. Evid. Because Smith did not object

[2] The background statements that are intelligible included ambiguous phrases such as "get it" and "where snap is at."

on these grounds below, he has, again, waived review for all but fundamental error. *See Moody*, 208 Ariz. 424, ¶ 120. And because he has failed to allege the error here was fundamental, and any such error not being evident, he has waived this argument. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17; *see also State v. Fernandez*, 216 Ariz. 545, ¶ 32 (App. 2007) (appellate court will not ignore fundamental error if apparent in the record).

¶25 Smith additionally contends admitting the audio portion of the video was erroneous "because the jury could take some of the remarks as being for the truth of what they believed was said." The remarks, however, were unclear at best, neither the state nor Smith at any time suggested they carried any meaning, and the jury was specifically instructed to disregard anything said in the video. As noted earlier, we presume the jurors followed their instructions. *See Newell*, 212 Ariz. 389, ¶ 68. Accordingly, Smith has not demonstrated any error from the admission of the exhibit.

Social Media Testimony

¶26 Two witnesses testified about a Snapchat video they each reported seeing when they accessed Jaida's social media the day of the shooting, depicting Smith in a car holding a handgun and "waving" it around. Although law enforcement officers had attempted to obtain a copy of the reported video, they were unsuccessful because the service provider does not archive the videos. Smith argues the trial court abused its discretion by admitting the witnesses' testimony because "the video was not available, could not be verified, and its foundation was suspect."

¶27 Ariz. R. Evid. 602 provides, "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. Evidence to prove personal knowledge may consist of the witness's own testimony." Here, both S.D. and M.B. testified they had personally seen the video and they described its contents. Thus, there was sufficient foundation for their testimony; the video's unavailability was inconsequential. To the extent Smith suggests the witnesses were untruthful about having seen the video, such would go to the credibility and weight of their testimony, not its admissibility. *See State v. Bustamante*, 229 Ariz. 256, ¶ 5 (App. 2012) ("[C]redibility of witnesses and the weight given to their testimony are issues for the jury, not the court."); *see also State v. Lehr*, 201 Ariz. 509, ¶ 24 (2002) ("It is a basic maxim that judges determine admissibility of evidence and juries decide

what weight to give it."). The trial court did not abuse its discretion in admitting the testimony.

Disposition

¶28 For all of the foregoing reasons, Smith's convictions and sentences are affirmed.