IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

FLOYD LONIEL LEE,
Appellant.

No. 2 CA-CR 2019-0026
Filed January 24, 2020

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NOT FOR PUBLICATION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 Pima County
No. CR20174416001
The Honorable Michael Butler, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
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Counsel for Appellee

James L. Fullin, Pima County Legal Defender
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MEMORANDUM DECISION

Judge Brearcliffe authored the decision of the Court, in which Presiding Judge Staring and Chief Judge Vásquez concurred.

B R E A R C L I F F E, Judge:

¶1 Floyd Loniel Lee appeals from his convictions after a jury trial of aggravated robbery, armed robbery, and aggravated assault with a simulated deadly weapon. The trial court sentenced him to concurrent prison terms, the longest of which is fourteen years. Lee contends that the court committed reversible error when it admitted a witness's out-of-court statement to a detective as a prior consistent statement. We affirm.

Factual and Procedural Background

¶2 "We view the facts in the light most favorable to sustaining the jury's verdicts." *State v. Wright*, 239 Ariz. 284, ¶ 2 (App. 2016). On September 17, 2017, L.S. was working the graveyard shift as a cashier at a fast-food restaurant "drive-thru" window. At about 11:50 p.m., a red car drove up to her window but stopped further from the window than cars typically do. Those in the car, an African-American man in a white shirt and a Caucasian woman, asked for water. When L.S. got the water, a partially masked person, who she could identify as an African-American man, walked up to the window. He was wearing a short-sleeved, white t-shirt, red hat, dark pants, and black and white shoes. He pointed what appeared to be a rifle at L.S. and said, "don't move or I'll shoot." The man told L.S. to give him the money from her cash register and, when she opened the register, he took the entire cash drawer. He then, at 11:51 p.m., left on foot with the cash drawer. The restaurant surveillance camera captured video of the robbery.

¶3 The red car at the window did not pull away until the masked man reached through the window to take the cash drawer. From the restaurant surveillance footage, an officer was able to identify the car as a "burgundy maroon" Buick Verano and record a partial license plate number. The police located the car at a motel about an hour and a half after the robbery.

¶4 Surveillance video from the motel captured images of the Buick Verano and its three occupants—later identified as Sarah Wallace, Jamal Morgan, and Lee—arriving at the motel at 11:57 p.m. Wallace got out of the front passenger seat, Morgan, in a sleeveless white t-shirt, got out of the driver seat, and Lee, in a short-sleeved white t-shirt, dark pants, and black-and-white shoes, got out by the rear, passenger-side door. Morgan, upon leaving the car, reached into the back seat and retrieved what appeared to be a rifle. All three went into room 206. Officers obtained a search warrant for the room.

¶5 In executing the warrant, the officers found Wallace and Lee, among others, in the room. Lee's pants and shoes matched those of the robber in the restaurant surveillance video. The officers also found a BB gun resembling an AK-47 under a mattress in the room. The officers detained Wallace and Lee.

¶6 Detective Nicole Harkey interviewed Wallace later in the morning. She told Harkey that she had been with both Morgan and Lee before going to the restaurant. However, before they arrived at the restaurant, Lee had gotten out of the car. When she and Morgan pulled up to the drive-thru window, Morgan was driving and Lee, armed, was standing by the window. Wallace told Harkey that Lee is the one who robbed the restaurant.

¶7 At a subsequent deposition, however, Wallace stated that Lee had not committed the robbery, he had been in the backseat of her car at the time of the robbery, Morgan had been driving, and another person had committed the robbery. She also admitted she was not a credible witness and was a "drugg[ie]."

¶8 At trial, during opening statements, Lee told the jury that "[Wallace] is not a credible witness. She is unreliable. She lies." He emphasized the inconsistencies between Wallace's statements to Detective Harkey the morning after the robbery, her deposition testimony, and her testimony during a prior hearing in the case.[1] Wallace testified at trial that Lee had committed the robbery, and that, although she had been "out of it" during the robbery, she knew it was Lee based on the video she had seen of the robbery. Although the video did not have sound, Wallace testified that she remembered Lee "telling [the cashier] to give him the money."

[1]The "prior hearing" was the first trial in this matter which ended in a mistrial.

¶9 On cross-examination, Wallace stated that she did not remember the route taken to the motel after the robbery, Lee getting out of the car to commit the robbery, or whether someone had put a gun or a hat in her car before she went back to the motel. And she also stated that much of her testimony about the robbery was based on what she had read somewhere or had seen on a video. Wallace acknowledged that, in her deposition testimony, she had stated that another person had committed the robbery. She also admitted that she was, and still is, afraid of Morgan, and that he had told her he would kill her if she said anything about the robbery. Lee impeached Wallace with her three prior felonies, her use of methamphetamine four days before the robbery occurred, and her deposition statement that she was not a credible witness.

¶10 As he signaled in opening statements, Lee also questioned Wallace about her interview with Detective Harkey the day of the robbery and her later inconsistent statements:

> Q . . . When you talked with . . . Det. Harkey on September the 18th, . . . you told her, didn't you, that Floyd Lee got out of the car somewhere near A Mountain, right?
>
> A Right.
>
> Q When you—at the time of your deposition on March the 30th, . . . you testified that nobody got out of the car before you guys went to [the restaurant]; isn't that correct?
>
> A Correct.
>
> Q But now your testimony today is different from your testimony under oath on that day, correct?
>
> A Yes.

¶11 In re-direct examination, the state put the transcript of Wallace's interview with Harkey before her, and asked:

> Q Okay. And so when you're talking to the detective on Page 22, you guys are talking about when you were right outside the drive-thru window of the [restaurant], correct?

A Yes.

Q And at that point, what do you say that [Lee] was doing?

A I said he was robbing them.

. . . .

Q Okay. So again, before you saw the video, if you looked on . . . Line 23 of that same page, talking to the detective right after it happened, are you giving her specifics about how this happened?

A Yes.

Q Okay. What sort of specifics are you able to give the detective that day?

A I was saying he was inside like standing outside the window, but inside the window.

Q And then you're also able, if you turn to the next page, on Line 23, you're still talking about this robbery, right?

A Uh-huh.

Q Okay. And if you go down to the very bottom of that page, Line 42, are you able to even get more specific about what [Lee] was doing during this robbery before you saw the video?

A Yeah. I said he was like inside, . . . halfway inside the window.

Q And if you turn to the next page, on Page 24, that same exhibit, on Line 3, were you able to give specifics before you saw the video on the morning after this happened about what [Lee] was saying at the time he was robbing this woman?

> A Yeah. He said . . . give me the fucking money.
>
> . . . .
>
> Q Before you ever saw the video, were you able to give us some specifics about that gun?
>
> A Yeah.
>
> Q What kind of specifics were you able to give?
>
> A I said some kind of a shotgun.

¶12 The next day, the state informed the trial court that, through Detective Harkey's testimony, it intended "to go through Sarah Wallace's original statement to police in detail . . . as a prior consistent statement." The state asserted that these statements qualified as prior consistent statements under Rule 801, Ariz. R. Evid., because Lee had from the very beginning of the trial attacked Wallace's credibility and alluded to Wallace's testimony being a recent fabrication.

¶13 Lee objected, asserting that all of Wallace's statements had been presented to her during her testimony, that she had been "examined, cross-examined on all the statements," and that the "issue has already been presented to the Jury." He further argued "that the Jury can now . . . decide for themselves what weight to give to any of these statements. So I think it's cumulative . . . ." After further discussion, the trial court sought to clarify the basis of Lee's objection: "I think what you're saying is . . . you don't have a valid objection on the hearsay issue, but you're saying cumulative?" Lee then stated: "I think my objection on the[—]my objection on the hearsay[—]well, it is cumulative. And it's[—]and I don't think it should be covered under that exception because it has already been presented to the Jury . . . ." Having attempted to clarify Lee's position, the court overruled the objection, noting "because it's already been presented, that's not an objection to it being hearsay." Detective Harkey then testified to Wallace's prior statements, including that Lee did commit the robbery.

¶14 The jury found Lee guilty. The trial court sentenced him as described above, and this appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Analysis

¶15 "We review the trial court's evidentiary rulings for an abuse of discretion." *Wright*, 239 Ariz. 284, ¶ 8. On appeal, Lee argues that the court's ruling allowing Detective Harkey to testify to the details of her interview with Wallace was error because Wallace's "statement to the detective was made after the motive to fabricate arose." Lee frames the defense's objection during trial as this: "The defense objected that the statement was hearsay and cumulative." But Lee's recounting of his objection in the trial court is not accurate.

¶16 "Hearsay," is specifically defined by Rule 801(c)(1) and (2), Ariz. R. Evid., but is commonly described as "[a]n out-of-court statement offered to prove the truth of the matter asserted." *State v. Bass*, 198 Ariz. 571, ¶ 20 (2000). Under Rule 802, Ariz. R. Evid., unless otherwise expressly permitted, "[h]earsay is not admissible." But, under Rule 801(d)(1)(B)(i) or (ii), an out-of-court statement, even if offered for the truth of the matter it asserts, is not hearsay if it "is consistent with the declarant's testimony" and was offered:

> (i) to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or
>
> (ii) to rehabilitate the declarant's credibility as a witness when attacked on another ground.

¶17 Here, as the state argues, Lee did not make a general hearsay objection to Detective Harkey's testimony under Rules 801 and 802, let alone the specific objection he makes on appeal as to the applicability (or inapplicability) of Rule 801(d)(1)(B)(i) or (ii). Instead, Lee's objection to Harkey's testimony below focused on its cumulativeness. A cumulativeness objection is not a hearsay objection, but arises out of Rule 403, Ariz. R. Evid.:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

¶18 An "objection must state specific grounds in order to preserve the issue" for harmless error review on appeal. *State v. Moody*, 208 Ariz. 424, ¶ 39 (2004)*; see* Ariz. R. Evid. 103(a) ("A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and . . . if the ruling admits evidence, a party, on the record: (A) timely objects . . . and (B) states the specific ground . . . ."). Once a party has presented specific grounds, the trial court has "an opportunity to correct any error and allows opposing counsel a chance to 'obviate the objection.'" *State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008) (quoting *State v. Rutledge*, 205 Ariz. 7, ¶ 30 (2003)). But "an objection on one ground does not preserve the issue on another ground," *id.*, and thus Lee's failure to object below on the basis of hearsay did not preserve the issue for harmless error review.[2]

Fundamental Error

¶19 Because Lee failed to preserve the hearsay issue, we will review the claimed error only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005) ("Fundamental error review . . . applies when a defendant fails to object to alleged trial error."). To that end, Lee does argue that the trial court committed fundamental error by allowing Harkey's testimony, claiming that it "went to the foundation of the case—which was Wallace's credibility."

¶20 In *State v. Escalante*, our supreme court clarified the nature of review for fundamental error. 245 Ariz. 135 (2018). A defendant who fails to object at trial forfeits the right to appellate relief unless he can show trial error exists, and that the error went to the foundation of the case, took from him a right essential to his defense, or was so egregious that he could not possibly have received a fair trial. *Id.* ¶ 21. If a defendant can show the error deprived him of a right essential to his defense or, as Lee claims here, that it went to the foundation of his case, he must also separately show that prejudice resulted from the error. *Id.* If, however, a defendant shows the error was so egregious he could not have received a fair trial, he need not show any prejudice, and he must be granted a new trial. *Id.* "[T]he first

[2]Had the hearsay objection been preserved, we would have reached the same conclusion under harmless error review in light of the overwhelming evidence in the record of Lee's guilt. *See State v. Robles*, 182 Ariz. 268, 273 (App. 1995) (Assuming *arguendo* that testimony was erroneously admitted, it was harmless error "in view of the overwhelming evidence against appellant.").

step in fundamental error review is determining whether trial error exists." *Id.*

¶21 Consequently, Lee must demonstrate both an error and prejudice, but if he fails to show either one, then his convictions and sentences must be affirmed. *See id.* ¶¶ 21, 43. Manifestly, any prejudice must be linked to the claimed error. *See id.* ¶¶ 29-34; *see also State v. Champagne*, 247 Ariz. 116, ¶ 69 (2019) ("The inquiry [is] . . . whether the guilty verdict actually rendered in this trial was surely unattributable to the error."). Here, Lee cannot show such prejudice and therefore we need not reach the question of error.

Lack of Prejudice

¶22 In making his fundamental error argument on the grounds of hearsay, Lee objects solely to Detective Harkey testifying to Wallace's out-of-court statements. He has not complained here, and did not object below, to the state's use of those very same statements from Harkey's interview in its re-direct examination of Wallace.

¶23 In that re-direct examination, quoted at length above, Wallace recounted that she had told Harkey that Lee got out of the car before she and Morgan arrived at the restaurant, that Lee was standing beside the drive-thru window, that he had "some kind of shotgun," that he "was robbing them," that Lee told the cashier to "give [him] the fucking money," and that he reached into the cashier window. Thus, by the time Harkey testified about Wallace's statements, both their substance and that they were consistent with Wallace's trial testimony was before the jury. Harkey's testimony was therefore merely cumulative. But, because Lee abandoned the objection he raised at trial—that Harkey's testimony was impermissibly cumulative—he has made no argument that might have shown that such testimony was, by virtue of its repetition, prejudicial. Even so, such cumulativeness would not have, under these facts, amounted to fundamental error. *See State v. Williams*, 133 Ariz. 220, 226 (1982) ("[E]rroneous admission of evidence which was entirely cumulative constitute[s] harmless error."); *State v. Granados*, 235 Ariz. 321, ¶ 35 (App. 2014) (holding defendant could not show prejudice when the objected to evidence was cumulative). Consequently, given the absence of any showing of prejudice, there is no basis under fundamental error review to disturb Lee's convictions and sentences.

Disposition

¶24 For the foregoing reasons, we affirm Lee's convictions and sentences.