IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

MANUEL DAVID SESMA,
Appellant.

Nos. 2 CA-CR 2019-0039 and
2 CA-CR 2019-0040 (Consolidated)
Filed May 1, 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NOT FOR PUBLICATION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
Nos. CR20150244001 and CR20173132001
The Honorable John C. Hinderaker, Judge

AFFIRMED

COUNSEL

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

Vanessa C. Moss, 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 Manuel Sesma appeals from his convictions and sentences for five counts of aggravated assault, one count of kidnapping, and one count of attempted first-degree murder. He argues the trial court erred by admitting certain evidence at trial. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In January 2015, Sesma and his girlfriend, F.L., had an argument and Sesma left their shared residence. F.L. later telephoned Sesma and asked him to remove his belongings. When he returned, "he was very upset" and pounded on the door to be let in. After F.L. opened the door, Sesma entered and "threw [her] against the counter and started punching [her] like a punching bag with his fist." He then dragged F.L. by her leg into the kitchen, left briefly to retrieve a loaded gun from the bedroom, grabbed F.L. by the neck, and took her to the bedroom where he put the barrel of the gun inside her mouth. He held F.L. down by her neck with one hand and said, "[D]o you want to die . . . ?"

¶3 Sesma then released F.L.'s neck and threw her against some stereo speakers in the bedroom. She fell and grabbed her cell phone, but Sesma took it and threw it against the wall. Sesma eventually left, and F.L. went to her neighbor's house for help. Tucson Police Department (TPD) officers arrived and found F.L. visibly shaken with her face red, swollen, and in the process of bruising. The house was in a state of disarray, with the television, stereo speakers, and other household items knocked over. When officers spoke to Sesma the following day, he initially denied F.L.'s account, but later admitted pointing a gun at her, claiming F.L. had threatened him with a knife. He also admitted pushing her down onto the couch, but said he did not remember holding her by the neck.

¶4 Sesma was arrested and charged with three counts of aggravated assault. He thereafter posted bond and was released. About five months later, Sesma and F.L. resumed their relationship.

¶5 In 2017, while Sesma was awaiting trial on the 2015 charges, F.L. confronted him, alleging he had been unfaithful and slapped him. The next morning, F.L. told Sesma he needed to leave her residence. Sesma then grabbed and held F.L. by the neck, and she passed out. When she regained consciousness, Sesma was dragging her by her arms into the bathroom and he had used a pocket knife to inflict a ten-centimeter gash across the left side of F.L.'s neck.

¶6 In the bathroom, Sesma cut his own wrist and neck, showed F.L. the cuts, and said, "[L]ook, this is what you wanted." He then pushed blood out of his wrist and dripped it onto F.L. "from head to toe." Sesma also collected blood from the floor and spread it on his own face and body. F.L. saw large clots of blood and said, "[W]here is that coming from," but then noticed bleeding from her neck. Sesma placed the pocket knife in her hand, and squeezed her hand shut over it, asking her, "[A]re you dead now? Are you gone now?"

¶7 Sesma also grabbed a washcloth, smeared it with blood from the floor, and pressed it against F.L.'s mouth as he squeezed her nose. F.L. could not breathe and pretended to be dying. Sesma said "So you're dead, okay," then stabbed F.L. in her side with the pocket knife, and she lost consciousness again. When she came to, she saw Sesma was not moving and tried to walk and eventually crawled to her brother's room and knocked on his door. F.L.'s brother opened the door and saw F.L. "laying down on the floor full of blood"; he told his wife to call 9-1-1.

¶8 TPD officers arrived and while they administered first aid to F.L., she told them she had been cut by "Manuel" and he had then intentionally cut himself. Both F.L. and Sesma were transported to a hospital where it was determined the gash to F.L.'s neck had penetrated the muscle and her jugular vein, requiring emergency surgery.

¶9 When TPD detectives interviewed Sesma the next day, he initially claimed an unknown assailant had entered the house and attacked him and F.L., but later admitted he had "push[ed]" F.L. by the neck and struck her. He also admitted cutting her but claimed it had been an accident. Sesma was subsequently charged with attempted first-degree murder, four counts of aggravated assault, and kidnapping. The 2015 and 2017 cases were consolidated, and following a jury trial, Sesma was

convicted as described above. The trial court sentenced him to a combination of concurrent and consecutive sentences totaling twenty-eight years' imprisonment. We have jurisdiction over Sesma's consolidated appeals pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033.

Discussion

¶10 On appeal, Sesma raises a number of claims, arguing that the trial court erroneously admitted hearsay evidence. Because Sesma objected only to some of the testimony below, we apply different standards of review in evaluating his arguments. We first address those issues that Sesma has preserved for appeal.

Preserved for Appeal

¶11 Sesma argues the trial court erroneously admitted prejudicial hearsay when TPD Officer Law testified that F.L. had told him Sesma attacked her and inflicted his own injuries. The court overruled Sesma's objection, expressly admitting F.L.'s statements as excited utterance exceptions to the hearsay rule. We will not reverse evidentiary rulings absent an abuse of discretion. *State v. Lacy*, 187 Ariz. 340, 348 (1996).

¶12 Pursuant to Ariz. R. Evid. 803(2), an excited utterance is "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Thus, the three criteria for an excited utterance are: "1) There must be a startling event, 2) The words must be spoken soon after the event so as not to give the person speaking the words time to fabricate (or reflect), and 3) The words spoken must relate to the startling event." *State v. Rivera*, 139 Ariz. 409, 411 (1984).

¶13 Sesma has not demonstrated the trial court abused its discretion here. F.L.'s statement that Sesma had inflicted her injuries and his own related directly to the startling event—a violent attack in which F.L. received a life-threatening gash across her neck. F.L. related the events to the officers soon after the attack while she was still covered in blood, receiving first aid, and without time or reflection to fabricate her statement, as she had been drifting in and out of consciousness.

¶14 Sesma cites no authority and contends only that F.L.'s statements did not qualify as excited utterances because they "were not made immediately after the alleged attack, and there was minimal testimony that [she] was in an excited state at the time." But lapse of time is only one factor to be considered, and "[i]f the totality of the circumstances indicates that the statement was made in a state of shock or [the declarant's]

demeanor and actions had been altered, it is admissible, even though not made immediately after the event." *State v. Barnes*, 124 Ariz. 586, 589-90 (1980). Additionally, a statement is not inadmissible "because it is made in response to a question." *Id*. at 590. Under the totality of the circumstances here, we cannot say the trial court abused its discretion in admitting F.L.'s statements as excited utterances.

Reviewed for Fundamental Error

¶15 Sesma also challenges certain testimony from multiple witnesses as inadmissible hearsay. Sesma failed to raise an objection below to any of the testimony he now identifies, and the claims, as he acknowledges, are therefore reviewed for fundamental error. *See State v. Escalante*, 245 Ariz. 135, ¶ 12 (2018). Under this standard, Sesma has the burden to demonstrate the existence of error, that the error was fundamental, and that it resulted in prejudice. *Id.* ¶ 21; *State v. Henderson*, 210 Ariz. 561, ¶¶ 20, 23-24 (2005). An error is fundamental when it goes to the foundation of the defendant's case, takes away a right essential to his defense, or is of such magnitude that he could not have received a fair trial. *Escalante*, 245 Ariz. 135, ¶ 21.

¶16 Sesma assigns as improper hearsay: (1) a police sergeant's testimony that F.L. had told her Sesma inflicted her injuries; (2) a doctor's testimony quoting from a hospital report that indicated F.L. had been injured by Sesma; (3) that doctor's testimony quoting another medical record that identified Sesma as the attacker; (4) the doctor's testimony quoting from a psychiatric evaluation of F.L. that also named Sesma as F.L.'s assailant;[1] and (5) a detective's testimony that medical staff had told him Sesma was not given medication before being questioned, contrary to Sesma's subsequent claim.

¶17 But aside from providing the definition of hearsay and labeling the testimony as such, Sesma has failed entirely to explain how any of the testimony was inadmissible. Indeed, the statements could readily fall under recognized hearsay exceptions validating their admission, as the

[1]This testimony is described as the "most egregious[]" "prejudicial double hearsay and unconfronted (and unconfrontable) expert testimony for which [the doctor] was a conduit." But aside from simply labeling it as such, Sesma has not explained how the testimony "vouch[ed] for [F.L.'s] status as a domestic abuse victim, was even more damaging, and more prejudicial than probative." *See Moody*, 208 Ariz. 424, n.9 (merely mentioning argument insufficient).

state argues, and to which argument Sesma has not responded. *See* Ariz. R. Evid. 802, 803 (recognizing over twenty exceptions to the rule against hearsay, including excited utterances and statements made for the purpose of medical treatment). Accordingly, we find Sesma's sparse argument insufficient to demonstrate the trial court committed any error, let alone fundamental error. *See State v. Moody*, 208 Ariz. 424, n.9 (2004) ("[M]erely mentioning an argument [in an opening brief] is not enough."); *State v. Carver*, 160 Ariz. 167, 175 (1989) ("Failure to argue a claim usually constitutes abandonment and waiver of that claim.").

Waived on Appeal

¶18 "In Arizona, opening briefs must present significant arguments, supported by authority, setting forth appellant's position on the issues raised." *Carver*, 160 Ariz. at 175; *see also* Ariz. R. Crim. P. 31.10(a)(7)(A) (argument must contain "contentions with supporting reasons for each contention, and with citations to legal authorities . . . on which the appellant relies"). As already noted, "[m]erely mentioning an argument is not enough." *Moody*, 208 Ariz. 424, n.9. And a "single, conclusory statement" does not meet "the letter [or] the spirit" of the Arizona Rules of Criminal Procedure. *State v. McCall*, 139 Ariz. 147, 164 (1983). Rather, where relevant case law is cited "in passing," but the appellant did not develop any argument on the point, we will find the issue waived. *Moody*, 208 Ariz. 424, n.11. And failure to develop an argument as required by the Arizona Rules of Criminal Procedure results in waiver of the issue. *State v. Sanchez*, 200 Ariz. 163, ¶ 8 (App. 2001).

¶19 Sesma appears to make several additional claims that the admission of the complained-of hearsay evidence denied him his constitutional right to confrontation. We find those claims waived, however, because Sesma has failed to develop any argument whatsoever on these points, only concluding that the testimony amounted to "unconfrontable hearsay." The sole legal authority he cites in support is the standard under which we review confrontation claims. This is insufficient. *See Moody*, 208 Ariz. 424, nn.9, 11; *McCall*, 139 Ariz. at 164. Additionally, to the extent Sesma intended to raise an issue related to one detective's testimony that F.L.'s statements were consistent both at a preliminary hearing and when she was interviewed, he has failed entirely to develop any related argument; therefore any such issue is waived. *See Sanchez*, 200 Ariz. 163, ¶ 8.

Disposition

¶20 For the foregoing reasons, Sesma's convictions and sentences are affirmed.