IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ROBERT JAMES MAJOR,
Appellant.

No. 2 CA-CR 2020-0025
Filed August 31, 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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201802720
The Honorable Christopher O'Neil, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

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

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

¶1 Robert Major appeals from his convictions of two counts of aggravated assault. He argues the victim's out-of-court statements admitted at trial were inadmissible hearsay, resulting in fundamental error and, additionally, that admission of purported other-act evidence also was fundamental error.[1] We affirm.

¶2 Viewed in the light most favorable to upholding the verdicts, *see State v. Tamplin*, 195 Ariz. 246, ¶ 2 (App. 1999), the evidence shows that, in June 2017, Major threw a drinking glass at the victim while she was sleeping, causing a deep cut on her cheek. Major was charged with aggravated assault with a deadly weapon or dangerous instrument and aggravated assault causing temporary but substantial disfigurement.

¶3 The victim testified she had told police that Major "had thrown a glass at [her] face"; other witnesses testified that she had told them the same. Major did not object to any of these statements. The victim had initially reported that Major had struck her with a glass, but later stated she "wasn't entirely certain what had happened" and retreated from her initial story. She told hospital personnel she had been injured in a bar fight.

¶4 Later, however, she contacted police and confirmed that Major had hit her in the face with the glass. She testified she had delayed telling police that Major had assaulted her because she was afraid of him,

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[1]As we explain, Major has not established any error and we therefore need not address whether the alleged error was fundamental and prejudicial. *See State v. Escalante*, 245 Ariz. 135, ¶ 21 (2018) ("[T]he first step in fundamental error review is determining whether trial error exists."). Nor do we address Major's passing claim that admission of the evidence violated his right to due process. *See State v. Bolton*, 182 Ariz. 290, 298 (1995) (insufficient argument waives claim on appeal).

but ultimately decided to "tell the truth about what happened" because "fighting" and "threats" had "continued" after the incident. And a police officer testified the victim had told him she had delayed reporting "what had actually happened" because she "had been too scared." A second officer noted that "fear" is "a big factor" when speaking to victims of domestic violence. Again, Major did not object to this testimony.

¶5 After a two-day trial, the jury found Major guilty of both charged counts. The trial court sentenced him to concurrent prison terms, the longer of which is eleven years. This appeal followed.

¶6 Major first argues the various statements by the victim and others that he had thrown a glass at her are inadmissible hearsay. We agree with the state, however, that these statements are not hearsay.[2] We review the admission of evidence for an abuse of discretion but review interpretation of the rules of evidence de novo. *See State v. King*, 213 Ariz. 632, ¶ 7 (App. 2006). Hearsay is any statement by a declarant not made at the current trial or hearing that is offered "to prove the truth of the matter asserted in the statement," Ariz. R. Evid. 801(c), and is presumptively inadmissible, Ariz. R. Evid. 802. But, an out-of-court statement by a witness subject to cross-examination is not hearsay if it is consistent with the witness's testimony and is offered "to rehabilitate the declarant's credibility as a witness when attacked on another ground." Ariz. R. Evid. 801(d)(1)(B)(ii); *see also State v. Bruggeman*, 161 Ariz. 508, 510 (App. 1989). Major challenged the victim's credibility in his opening statement, focusing on her delay in reporting the assault and her inconsistent explanations for her injury. Thus, the state was entitled to introduce her out-of-court statements—which were consistent with her trial testimony—to rebut that attack. The court did not err in declining to preclude this evidence sua sponte.

¶7 Major next contends that testimony about the victim's fear of him, including her reference to "fighting" and "threats," constituted improper other-act evidence under Rule 404(b), Ariz. R. Evid. We first note that the evidence the victim was afraid of him is not other-act evidence and

[2]We doubt that a witness's testimony about her own out-of-court statement would constitute hearsay, since, by describing the previous statement, the witness necessarily has made the statement "while testifying at the current trial or hearing." Ariz. R. Evid. 801(c)(1). We need not decide this precise question, however, because the victim's statement is not hearsay in any event.

does not fall under Rule 404(b).[3] And her general reference to "fighting" and "threats" is admissible under Rule 404(b) to explain her hesitancy to report the assaults. *See State v. Jeffers*, 135 Ariz. 404, 417 (1983) (evidence of defendant's other acts admissible to show witness's fear and explain her failure to promptly report murder).

¶8 Major also asserts the evidence was unduly prejudicial and thus should have been excluded under Rule 403. That rule permits a trial court to "exclude relevant evidence," including other-act evidence, "if its probative value is substantially outweighed" by the danger of unfair prejudice. Ariz. R. Evid. 403. But his argument seems to assume the evidence did not qualify for admission under Rule 404 which, as we explained, it does. And, a trial court readily could conclude that any prejudice to Major was outweighed by the probative value of the victim's explanation for her delay in reporting—a vector of Major's attack on her credibility. We cannot say as a matter of law that the evidence was subject to preclusion under Rule 403, nor that the court abused its discretion in declining to preclude the evidence on its own motion.

¶9 We affirm Major's convictions and sentences.

[3]Although Major mentions Rule 404(a), which generally prohibits "[e]vidence of a person's character . . . for the purpose of proving action in conformity therewith," he does not develop any argument that evidence the victim was afraid of him constitutes character evidence or would be precluded by Rule 404(a). He has therefore waived this argument on appeal. *See Bolton*, 182 Ariz. at 298.