IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

FRANCISCO CRUZ JR.,
Appellant.

Nos. 2 CA-CR 2020-0056 and
2 CA-CR 2020-0057 (Consolidated)
Filed March 8, 2022

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NOT FOR PUBLICATION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. CR20180091001 and CR20180544001 (Consolidated)
The Honorable Christopher C. Browning, Judge

AFFIRMED

COUNSEL

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Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
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MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 In two consolidated cases, Francisco Cruz was convicted after a jury trial of four counts of aggravated harassment, one count of stalking, one count of first-degree burglary, two counts of kidnapping, and two counts of aggravated assault with a deadly weapon or dangerous instrument. The trial court sentenced him to prison terms totaling 39.5 years. On appeal, Cruz argues the court erred by denying his request to introduce the statement of an unavailable witness, allowing testimony that purportedly violated the court's ruling on his motion in limine, and consolidating his charges for trial. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Pena*, 235 Ariz. 277, ¶ 5 (2014). In November 2017, Cruz's wife obtained an order of protection against him after the two had separated. A month later, in violation of the order, Cruz began emailing his wife, who had since moved, to find out where she lived. His attempts were unsuccessful.

¶3 On December 18, 2017, Cruz's in-laws, J.C. and M.C., had just arrived home from a doctor's appointment when they were confronted by an intruder. Although the intruder was wearing sunglasses, a mask, a hat, and gloves to conceal his identity, M.C. believed him to be Cruz. The intruder, with a machete in one hand and a Taser in the other, proceeded to tase the couple and duct tape their mouths, hands, and feet. The intruder also broke pictures of Cruz's wife and took some jewelry. He then used M.C.'s phone to send text messages. At some point, M.C. was able to remove the duct tape from her hands, grab her husband's phone, and call the police.

¶4 Meanwhile, Cruz's wife received text messages from her mother's phone, claiming her father was trying to hurt himself and asking her to come to the house alone. Despite the unusual nature of the texts, she decided to go to her parents' house where she met law enforcement and

learned of the home invasion. While at her parents' house, she informed police about Cruz's attempts to contact her. The next day, she received threatening text messages from an unknown number. The messages included personal details, leading her to believe Cruz was the author. Cruz also sent her threatening texts from his cell phone and made Facebook posts accusing her of cheating on him and suggesting he knew her current location.

¶5 Cruz was indicted on four counts of aggravated harassment, one count of stalking, one count of first-degree burglary, two counts of kidnapping, and two counts of aggravated assault with a deadly weapon or dangerous instrument. He was tried, convicted, and sentenced as described above. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Unavailable Witness Testimony

¶6 Cruz contends the trial court abused its discretion by denying his motion, filed "two judicial days" before trial, seeking to introduce statements J.C. had made to law enforcement on the day of the home invasion, including a description of the intruder.[1] J.C. had passed away in late 2018. Specifically, Cruz sought to introduce J.C.'s statements that he "couldn't tell" whether the intruder was "Mexican . . . or white," that he "couldn't recognize [the intruder]," and that the intruder spoke "broken English."

¶7 After a hearing on the first day of trial, the court denied Cruz's motion. Although the court found his motion untimely, it nonetheless addressed the merits of his arguments. It found the statements were

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[1] Cruz's attempt to "incorporate[] the law and argument" of his Motion to Introduce Unavailable Witness Testimony is not permitted. *See* Ariz. R. Crim. P. 31.10(a)(7)(A) (argument section of opening brief must contain "contentions with supporting reasons for each contention, and with citations of legal authorities and appropriate references to the portions of the record on which the appellant relies"); *see also State v. Carver*, 160 Ariz. 167, 175 (1989) ("In Arizona, opening briefs must present significant arguments, supported by authority, setting forth an appellant's position on the issues raised."); *State v. Johnson*, 229 Ariz. 475, ¶ 23 (App. 2012) (declining to consider argument incorporated by reference in opening brief). Accordingly, we will only address the arguments he has fully developed in his opening brief.

hearsay and none of the exceptions for their admission applied.[2] The next day, M.C. testified that she knew the intruder was Cruz because she "recognized him" from "his mannerism[s]" and "his clothes." She further testified she and J.C. had "recognized him immediately," repeating that J.C. had recognized Cruz just before the state interrupted her and Cruz objected.

¶8 The state offered a curative instruction stating the jury should not "pay attention to those" statements about J.C. having recognized Cruz, and that the statements would be stricken from the record as improper hearsay. Although Cruz agreed with the curative instruction, he argued "the door has been opened" and he should therefore be allowed to introduce J.C.'s extrajudicial statements and cross-examine the officers to whom J.C. had made the statements. He was thus essentially asking the trial court to reconsider his prior motion to introduce J.C.'s statements. The court denied Cruz's request, stating he was not entitled to "both a curative instruction and then the opportunity to then go into matters that the Court has already precluded." Accordingly, the court instructed the jury to "disregard anything that [M.C.] has said about the identity of this person as said to her by her husband," further stating that "[s]he can tell you about what she saw, and what she believes, and who she thinks the intruder was, but not any comments about what her husband might have said about . . . who he thought the intruder was. So disregard that, and please don't consider that for any purpose." We review a trial court's ruling on the admissibility of hearsay evidence for an abuse of discretion. *State v. Franklin*, 232 Ariz. 556, ¶ 10 (App. 2013).

¶9 Cruz argues the curative instruction did "absolutely nothing to cure the false statements" made by M.C. He maintains the record is clear that J.C. never identified him as the intruder. After hearing argument on this issue, the trial court determined a curative instruction was the appropriate remedy to address Cruz's concerns, rather than permitting him to introduce the hearsay statements J.C. had made to law enforcement officers, which the court had already precluded when it denied Cruz's motion. *See State v. Herrera*, 203 Ariz. 131, ¶ 6 (App. 2002) ("A trial court is in the best position to determine an appropriate remedy for trial error that

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[2]The state argues that the trial court's denial of Cruz's motion as untimely was legally sufficient to deny relief and that Cruz has abandoned and waived any relief because he failed to present sufficient argument about this claim on appeal. *See Carver*, 160 Ariz. at 175. However, because the court addressed the merits of Cruz's arguments, we will do so as well.

will preserve a defendant's right to a fair trial."). We presume the jury followed the court's curative instruction. *State v. Dann*, 205 Ariz. 557, ¶ 48 (2003).

¶10 But even assuming the jury improperly considered the stricken testimony, Cruz was not prejudiced. On cross-examination, Cruz elicited testimony bearing on M.C.'s credibility and that her husband suffered from dementia. For example, Cruz questioned M.C. about why she did not mention during a police interview that she immediately recognized Cruz as the intruder despite her testimony on direct examination to the contrary. M.C. responded, "They never asked." Moreover, the officer who took J.C.'s statement on the day of the home invasion also testified that J.C. was only able to give him a "very vague description." On this evidence, the jury could evaluate M.C.'s credibility and determine the extent to which J.C. had identified the intruder. Thus, we will not reverse on this ground.

¶11 Cruz next argues, as he did below, that J.C.'s statements were admissible under the excited utterance exception to hearsay rule.[3] Hearsay statements are generally inadmissible unless they fall within a recognized exception, such as an excited utterance, Ariz. R. Evid. 802, 803(2), which is a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." For this exception to apply, the proponent must establish: "(1) a startling event, (2) a statement made soon after the event to ensure the declarant has no time to fabricate, and (3) a statement which relates to the startling event." *State v. Bass*, 198 Ariz. 571, ¶ 20 (2000). Excited utterances are "inherently trustworthy" based on the premise that startling events do not allow for conscious reflection. *State v. Thompson*, 169 Ariz. 471, 473 (App. 1991). "The time factor is probably the most important of the elements which enter into

[3] Cruz also argues that the statements are admissible under the present sense impression exception to hearsay rule. *See* Ariz. R. Evid. 803(1). Because this argument is raised for the first time on appeal, he has forfeited all but fundamental-error review. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19, 22 (2005) (argument raised for first time on appeal reviewed for fundamental error). And because he does not argue fundamental error, he has waived appellate review. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17 (App. 2008) (failure to argue fundamental error waives review), *overruled on other grounds by State v. Vargas*, 249 Ariz. 186, ¶ 1 (2020); *see also State v. Blakley*, 204 Ariz. 429, ¶ 38 (2003) (review of hearsay-exception argument waived when raised for first time on appeal).

determination of this exception" because "as the time interval increases, spontaneity decreases." *State v. Rivera*, 139 Ariz. 409, 411 (1984).

¶12 Here, it is undisputed that there was a startling event and that J.C.'s statements related to the event. We must therefore determine whether the elapsed time between the startling event and the statements allowed for conscious reflection. Cruz argues J.C.'s statements were made immediately after law enforcement removed the duct tape. This, however, does not align with the record, which is not clear about when J.C. made the "broken English" statement. The police report merely indicates that after the officer assisted the victims out of the residence, J.C. made the statement while waiting outside with the officer. And J.C.'s statements concerning whether he recognized the intruder and the intruder's ethnicity were made around two hours after officers arrived on the scene. Although statements made in response to questioning or after some lapse of time are not "necessarily inadmissible," we must determine whether the totality of the circumstances indicate that the declarant remained "in a state of shock" while making the statements. *State v. Barnes*, 124 Ariz. 586, 589-90 (1980).

¶13 The record does not indicate whether J.C. was still in shock from the startling event when he made the statements. Notably, during the interview that occurred two hours after the incident, J.C. made a point of stating what he would do to the intruder if he ever saw him again and how he should have responded to the encounter, which indicates he had time to reflect on the events surrounding the encounter. In any event, as described above, testimony concerning J.C.'s "vague description" of the intruder was admitted. And as to the "broken English" statement, the record is similarly silent on J.C.'s mental state at the time it was made. Based on this record, the trial court did not abuse its discretion in determining the statements were not admissible as excited utterances.

Motion in Limine

¶14 Cruz argues the state violated his due process right to a fair trial by eliciting testimony identifying him as the author of messages sent after the home invasion. He maintains the trial court had ruled the testimony inadmissible in a pretrial ruling. We review a trial court's decision on the admissibility of evidence for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, ¶ 29 (2004).

¶15 Before trial, the court granted Cruz's motion in limine to preclude "[s]peculation by any witness as to the authorship of text messages . . . that were received by the alleged victim(s)." In its ruling, the

court explained that the state could elicit testimony about the context of the messages but was not allowed to have the victim "go that extra mile" and testify as to her "opinion, belief, thought, supposition, whatever you want to call it, that the texts came from [Cruz]." The court also clarified with defense counsel that the state could argue that the jury could reasonably conclude Cruz sent the texts given the "context of the messages, and all of the other attendant facts." Counsel agreed that the state "has to elicit the information to argue it."

¶16 During the state's direct examination of Cruz's wife, the following exchange occurred:

> [State:] Going through this series of text messages, was there anything about these text messages that indicated that these came from the defendant, Francisco Cruz?
>
> [Victim:] Yes.

Cruz objected. The trial court overruled the objection but advised that the state must "establish that it's more than just wild speculation." The state continued its direct examination, focusing on why Cruz's wife believed he had authored the text messages.

¶17 The next day, Cruz moved for a mistrial, arguing that he was prejudiced when the state violated the trial court's ruling in limine. The court denied the motion, stating that the victim "may have come up to the line or close to what was contemplated by the [ruling], but . . . she didn't cross the line."

¶18 Even assuming the state violated the court's ruling, we conclude the testimony was admissible evidence and, thus, Cruz cannot establish that he was prejudiced. As a lay witness, Cruz's wife was permitted to give opinion testimony as long as it conformed to Rule 701, Ariz. R. Evid. (lay witness's testimony may include opinions that are "(a) rationally based on the witness's perception [and] (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue"). She based her opinion that Cruz had sent the texts on the author's apparent familiarity with her. Specifically, the author accused her of cheating, which was "something that [Cruz] had been accusing [her] of," and referenced her children, Cruz's step-children, by name. Tellingly, the author made comments such as, "I love those kids like they're my own," "I took care of you . . . and all you did was use me for the last 6 years," "[y]ou put a wedge between me and your children," and "[s]ee you in court." Based on this

evidence, there was ample reason for Cruz's wife to infer that Cruz had sent the texts and this inference was helpful to determining who authored them.

¶19 Moreover, the testimony from Cruz's wife that she believed Cruz had authored the texts was not the only evidence establishing he was the author. Another witness testified that Cruz had identified himself during a phone call from the same phone number from which the texts to Cruz's wife had been sent. In sum, even assuming the state had elicited testimony from Cruz's wife in violation of the pretrial ruling, Cruz was not prejudiced because (1) the evidence was admissible, and (2) there was other evidence from which the jury could conclude Cruz had sent the threatening texts.

Consolidating Offenses

¶20 Cruz argues the trial court erred by consolidating his aggravated harassment and stalking charges with his assault, kidnapping, and burglary charges, and then declining to sever the same. We review a trial court's decisions on joinder and severance for an abuse of discretion. *State v. LeBrun*, 222 Ariz. 183, ¶ 5 (App. 2009).

¶21 In September 2018, the state filed a motion to consolidate Cruz's charges, contending that joinder was appropriate under Rule 13.3(a), Ariz. R. Crim. P., because they "are based on the same conduct and are connected in their commission" and "are part of a common scheme or plan." The trial court granted the motion over Cruz's objection that he is "entitled to severance as a matter of right" pursuant to Rule 13.4(b), Ariz. R. Crim. P. In December 2018, Cruz filed a motion for reconsideration, which the court denied. Cruz however did not renew his motion "during trial before or at the close of evidence" as required by Rule 13.4(c), and therefore waived his right to severance.

¶22 Because Cruz failed to renew his severance motion, we review this issue for fundamental, prejudicial error. *See Henderson*, 210 Ariz. 561, ¶¶ 19, 22. The state argues that Cruz has waived and forfeited his challenge to the trial court's ruling by not arguing fundamental error on appeal. We agree we are not required to address his arguments on the merits. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17; *see also State v. Flythe*, 219 Ariz. 117, ¶ 11 (App. 2008) (appellate review waived where appellant failed to renew motion to sever at trial and then failed to argue fundamental error on appeal). We nonetheless exercise our discretion and address the merits of Cruz's claim. *See State v. Aleman*, 210 Ariz. 232, ¶ 24 (App. 2005) (court has discretion to address waived arguments).

¶23 Cruz argues that "it is difficult to imagine" how the charges are based on the same conduct because the counts of harassment and stalking involved indirect contact with one victim and the counts of aggravated assault, kidnapping, and burglary involved direct contact with two different victims. He further argues that joinder was not appropriate because the evidence would not be admissible as proof in the separate cases. We disagree.

¶24 Rule 13.3(a)(2) permits joinder if the offenses "are based on the same conduct or are otherwise connected together in their commission." Offenses are considered connected if the "evidence of . . . [each] crime[] was so intertwined and related that much the same evidence was relevant to and would prove [each], and the crimes themselves arose out of a series of connected acts." *State v. Prion*, 203 Ariz. 157, ¶ 32 (2002). Rule 13.3(a)(3) permits joinder if the offenses "are alleged to have been a part of a common scheme or plan." A common scheme or plan requires "a particular plan of which the charged crime is a part." *State v. Ives*, 187 Ariz. 102, 108 (1996) (quoting *State v. Ramirez Enriquez*, 153 Ariz. 431, 433 (App. 1987)). Such a connection was present in this case.

¶25 Cruz's wife had obtained an order of protection against him in November 2017. Despite knowing the order was in place, he tried contacting her several times in December 2017 by sending emails, texts, and location share requests to "try[] to figure out where [she] was at," which resulted in his harassment and stalking charges. On December 18, Cruz broke into his in-laws' house, resulting in his aggravated assault, kidnapping, and burglary charges. During the home invasion, Cruz sent his wife texts from her mother's phone asking her to come to the house alone. All of Cruz's offenses, committed against his wife and her parents, are related to his common plan to make illegal contact with his wife. Similarly, if each case was tried separately, much of the same evidence would have been admissible as either intrinsic or other-acts evidence under Rule 404(b), Ariz. R. Evid. Therefore, we find no error, fundamental or otherwise.

Disposition

¶26 For the foregoing reasons, we affirm Cruz's convictions and sentences.