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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JON MARTIN, Appellant.	2 CA-CR 2008-0016 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR 2007-01396

Honorable Stephen F. McCarville, Judge

AFFIRMED

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H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Jon Martin was convicted of three counts of aggravated assault against a peace officer executing official duties. The jury found all three counts were dangerous offenses. The trial court sentenced Martin to three aggravated, consecutive terms of fifteen years' imprisonment. On appeal, Martin claims the trial court erred in permitting the state to prove aggravating factors and in precluding a defense witness from testifying.[1] For the following reasons, we affirm.

Facts

¶2 "We view the facts in the light most favorable to sustaining the convictions." *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). After deputies from the Pinal County Sheriff's Department approached Martin's house to execute a search warrant, they called through a loudspeaker for any occupants to come outside. When nobody responded, they attempted to contact the residents by telephone. The deputies then used a key they had obtained to open the front door. As they did so, one deputy called out "sheriff's department." They then heard the sound of a shotgun being "racked,"[2] and Martin, who was inside the house, said, "I'm going to shoot the next cop who comes in that door." The deputies retreated and, after some time passed, Martin apparently came out of the house without further incident.

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[1]Martin asserted a third claim in his opening brief but withdrew it in his reply brief. We therefore do not address it.

[2]One deputy testified that the term "racked" means "a pump shotgun . . . is being activated, taking a round out of a tube and put[ting it] into the chamber ready for fire."

¶3 The state charged Martin with three counts of aggravated assault against a peace officer. Martin's primary defense at trial was that he had not known the men entering his house were law enforcement agents and that he was justified in threatening to use force to defend himself and his property. The jury returned guilty verdicts on all three counts and, after a subsequent aggravation hearing, returned a separate verdict finding the state had proved several aggravating factors.

Aggravating Factors

¶4 Martin first argues the trial court erred in permitting the state to submit aggravating factors for the jury's determination. During a pretrial hearing, the court had ruled the state could not submit evidence of any aggravating factor other than that Martin was on probation release at the time of the offenses. When the state later sought to prove other factors at the aggravation hearing, Martin raised various objections but did not assert, as he does on appeal, that the court violated his substantive due process rights by "violating its own order regarding what aggravators the State could submit for jury determination."

¶5 When a defendant fails to object to an alleged error at trial, we review solely for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). An objection on one ground does not preserve other grounds for appeal. *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683-84 (App. 2008). To establish fundamental error, the defendant must show that this is one of "those rare cases that involve 'error going to the foundation of the case, error that takes from the defendant a right essential to his

defense, and error of such magnitude that the defendant could not possibly have received a fair trial.'" *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607, *quoting State v. Hunter*, 142 Ariz. 88, 90, 688 P.2d 980, 982 (1984). The defendant has the burden to show both fundamental error and prejudice. *Id.* ¶ 20.

¶6 Martin asserts fundamental error has occurred here. But he does not articulate the standard for fundamental error review and does not explain how the purported error in this case meets that standard. His sole argument regarding prejudice is that, had he known the state was going to allege the additional aggravating factors, he "might have opted to take a plea offer." But he provides no explanatory argument and points to nothing in the record to support this speculative assertion. *Cf. State v. Munninger*, 213 Ariz. 393, ¶ 14, 142 P.3d 701, 705 (App. 2006) (rejecting speculative unsupported argument that court would have imposed lower sentence if improper aggravating factor had not been considered). Martin has failed to show either fundamental error or prejudice.[3] *See Henderson*, 210 Ariz. 561, ¶ 20, 115 P.3d at 607.

Preclusion of Defense Witness

¶7 Martin next argues the trial court erred in precluding a defense witness who would have provided testimony corroborating Martin's "account of events." We review the

[3]Martin has also failed to show error, fundamental or otherwise, with respect to his related argument that aggravating factors must be alleged in the indictment. *See State v. Aleman*, 210 Ariz. 232, ¶ 23 & n.7, 109 P.3d 571, 578 & n.7 (App. 2005) (aggravating factors need not be alleged in charging document); *see also McKaney v. Foreman ex rel. County of Maricopa*, 209 Ariz. 268, ¶¶ 15-16, 100 P.3d 18, 21-22 (2004).

trial court's decision regarding the admission or exclusion of evidence for an abuse of discretion. *State v. Haight-Gyuro*, 218 Ariz. 356, ¶ 7, 186 P.3d 33, 35 (App. 2008).

¶8 In support of his justification defense, Martin testified he did not know the men entering his house were law enforcement officers and believed they were criminals invading his home illegally. Martin testified that, when the deputies attempted to come in the front door, he did not say he would shoot a "cop," but, rather, said, "If you come through my door, I will shoot just so you know." He then testified that he called his sister immediately after saying that and told her there was somebody outside trying to enter his home and that he did not know who it was. Martin sought to have his sister testify regarding this conversation and to confirm that he had made these statements to her. Martin argued the statements were admissible as either excited utterances or present sense impressions and could also be introduced as prior consistent statements to rebut the state's claim that his testimony was fabricated. The trial court precluded the witness's testimony as cumulative, finding that everything she would testify to had already been established through other evidence.

¶9 Hearsay is an out-of-court statement offered in court for its truth, and it is generally inadmissible. Ariz. R. Evid. 801(c), 802; *State v. Valencia*, 186 Ariz. 493, 497, 924 P.2d 497, 501 (App. 1996). A hearsay statement may be admissible, however, if it falls under one of the exceptions enumerated in Rules 803 and 804, Ariz. R. Evid. The excited-utterance exception applies to a "statement relating to a startling event or condition made while the declarant was under the stress of the excitement caused by the event or condition."

Ariz. R. Evid. 803(2); *see also State v. Cruz*, 218 Ariz. 149, ¶ 54, 181 P.3d 196, 208 (2008), *cert. denied*, ___ U.S. ___, 129 S. Ct. 900 (2009).

¶10 Martin claimed to have made the statements to his sister immediately after the deputies attempted to enter his house. He testified he had seen two men outside, one carrying a rifle. He avowed that he thought his home was being invaded and had been in "fear for [his] life." The statements Martin made to his sister concerned the arguably startling attempt by the deputies to enter his house. In response to a question regarding his level of excitement at the time he called his sister, Martin testified, "It was pretty intense. It was a very intense situation." In sum, Martin's out-of-court statements were made shortly after a startling event and related to that event. Therefore, they meet all the requirements of an excited utterance and the state does not argue otherwise.[4] *See id.*

¶11 "'[O]ur courts have not attempted to confine the application of the excited utterance exception solely to indisputably reliable statements.'" *State v. Alvarez*, 210 Ariz. 24, ¶ 17, 107 P.3d 350, 355 (App. 2005), *vacated in part on other grounds*, 213 Ariz. 467, 143 P.3d 668 (App. 2006), *quoting State v. Jeffers*, 135 Ariz. 404, 420, 661 P.2d 1105, 1121 (1983). Admitting the statements "'as a hearsay exception is not foreclosed by the fact that [the] statement[s'] reliability has been impugned.'" *Id.* Rather, a "witness's reliability 'goes to the weight of the statements, not their admissibility,'" and any question regarding

[4]We need not address Martin's argument that the statements would also be admissible as statements of present sense impression or as prior consistent statements offered to rebut a charge of fabrication.

credibility is for the jury. *Id.*, *quoting State v. Whitney*, 159 Ariz. 476, 484, 768 P.2d 638, 646 (1989); *cf. State v. Plew*, 155 Ariz. 44, 49-50, 745 P.2d 102, 107-08 (1987) (trial court's preliminary inquiry in determining if predicate condition fulfilled under Rule 104, Ariz. R. Evid., "'should be limited to asking whether evidence in the record . . . would permit a reasonable person to believe' the evidence on the preliminary questions"), *quoting State v. LaGrand (Walter)*, 153 Ariz. 21, 28, 734 P.2d 563, 570 (1987). Because Martin's statements fulfill the requirements of the excited-utterance exception and because any question regarding the reliability of those statements was for the jury to determine, the testimony was admissible.

¶12 However, evidence that is relevant and otherwise admissible may nonetheless be excluded if it is cumulative. *See* Ariz. R. Evid. 403. Cumulative evidence "augments or tends to establish a point already proved by other evidence." *State v. Kennedy*, 122 Ariz. 22, 26, 592 P.2d 1288, 1292 (App. 1979). Corroborative evidence, on the other hand, "tends to corroborate or to confirm" and includes evidence that goes "to the heart of appellant's defense." *Id.* at 26-27, 592 P.2d at 1292-93; *see also State v. Talmadge*, 196 Ariz. 436, ¶ 19, 999 P.2d 192, 196 (2000).

¶13 Martin's defense was that his threat of deadly force was justified because he did not know the men entering his house were sheriff's deputies. Other than Martin's own self-serving testimony, the proffered testimony of his sister was the only other evidence available to support his claim. We conclude this evidence was not cumulative; rather, it was

offered to corroborate Martin's assertions and went to the heart of his justification defense. *Cf. State v. Verive*, 128 Ariz. 570, 576, 627 P.2d 721, 727 (App. 1981) (witness testimony not cumulative where only witness and defendant present for conversation that was subject of testimony). Therefore, the trial court abused its discretion in precluding Martin's sister from testifying.

¶14 Although we conclude that error occurred, it is not necessary for us to reverse Martin's convictions if we can say beyond a reasonable doubt that precluding Martin's sister from testifying did not contribute to the verdict. *See State v. Carlos*, 199 Ariz. 273, ¶ 24, 17 P.3d 118, 124 (App. 2001). The state presented evidence the deputies had received information that Martin was aware they were going to be coming to execute the search warrant. Martin confirmed this in statements he subsequently made to his sister during a post-arrest phone call while he was in custody. When the deputies arrived, they parked several vehicles, some of which were marked as sheriff's department vehicles, outside Martin's house. Most of the deputies present, including those who approached the door, were in full uniform. They called out to Martin with a loudspeaker before entering the house. Upon opening the door, one deputy called out, "sheriff's department." All three deputies testified they were positive Martin said the word "cop" when threatening to shoot.

¶15 In light of overwhelming evidence that Martin knew he was threatening to shoot peace officers, we conclude beyond a reasonable doubt that the jury's verdict was not attributable to the error in precluding Martin's sister from testifying. *See id.*

Conclusion

¶16 Martin has not shown fundamental error with respect to the aggravating factors, and the error in precluding Martin's sister from testifying was harmless beyond a reasonable doubt. We therefore affirm Martin's convictions and sentences.

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JOSEPH W. HOWARD, Presiding Judge

CONCURRING:

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JOHN PELANDER, Chief Judge

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PHILIP G. ESPINOSA, Judge