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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STATE OF ARIZONA, Appellee, v. LAWRENCE CALVIN HURSEY, Appellant.	2 CA-CR 2008-0265 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR200700998

Honorable Janna L. Vanderpool, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

H O W A R D, Presiding Judge.

¶1 After a jury trial, appellant Lawrence Hursey was convicted of one count each of theft and third-degree burglary. The trial court sentenced him to concurrent, aggravated sentences, the longer of which was fourteen years. On appeal, Hursey contends the trial court erred in denying his motion to introduce photographs through the testimony of a state witness. He further argues the court erred in permitting the state to introduce evidence of his prior convictions and in denying his motion for a new trial without an evidentiary hearing. 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). Hursey and an accomplice were at a Coolidge city park. Hursey had a screwdriver in his hand and a kitchen knife in his back pocket. Items from a concession stand inside the park, including a large stainless steel kitchen sink, water fountain, and other objects, were found in the backseat of Hursey's car. Police found Hursey's shoe print inside the concession stand.

¶3 The state charged Hursey with third-degree burglary and theft. His defense was that he had been collecting scrap metal in the park and had not intended to steal. The jury found him guilty on both counts and returned a separate verdict finding the state had proved several aggravating factors. This appeal followed.

Introduction of Photographs

¶4 Hursey first argues the trial court erred in denying his motion to introduce photographs through the testimony of a witness for the state.[1] We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Spreitz*, 190 Ariz. 129, 146, 945 P.2d 1260, 1277 (1997).

¶5 A photograph is admissible as evidence at trial if it is relevant, *see* Ariz. R. Evid. 402, and if it "fairly and accurately depicts that which it purports to show." *State v. Paul*, 146 Ariz. 86, 88, 703 P.2d 1235, 1237 (App. 1985); *see also* Ariz. R. Evid. 901(a). This need not be proven, however, via testimony from the person who took the photograph. "'[T]he showing may be made by any evidence that bears on whether the photograph[] . . . correctly depicts what it purports to represent.'" *State v. Haight-Gyuro*, 218 Ariz. 356, ¶¶ 13-14, 186 P.3d 33, 36 (App. 2008), *quoting State v. Anglemyer*, 691 N.W.2d 153, 161-62 (Neb. 2005). If the showing is made through witness testimony, "'the individual who took

[1]Although Hursey argues the trial court erred in denying his motion to admit multiple "photographs," the court refused to admit only photograph number six; Hursey's trial counsel stated that she wished to "withdraw" the other proffered photographs. Hursey has therefore forfeited any challenge to the trial court's failure to admit the other photographs absent fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005); *cf. State v. Shlionsky*, 184 Ariz. 631, 633, 911 P.2d 637, 639 (App. 1996) (defendant's withdrawal of request to present mitigation evidence waives right to present that evidence); *State v. Castro*, 163 Ariz. 465, 475, 788 P.2d 1216, 1226 (App. 1989) (party waives issue by renouncing objection). And Hursey does not contend the purported error here was fundamental. Therefore, Hursey's argument as to those photographs is waived, and we only review the trial court's ruling on photograph number six. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

the photograph[] need not be the person who verifies [it] at trial, and the verifying witness is not required to have been present when the photograph[was] taken.'" *Haight-Gyuro*, 218 Ariz. 356, ¶ 7, 186 P.3d at 35, *quoting Lohmeier v. Hammer*, 214 Ariz. 57, ¶ 8, 148 P.3d 101, 105 (App. 2006). Rather, the verifying witness need only "'attest that the photograph[] accurately portray[s] the scene or object depicted.'" *Id.*

¶6 At trial, Hursey attempted to introduce a photograph of the area where the burglary and theft occurred. Because he was unable to find any defense witness to "lay the foundation" for the photograph, Hursey stated that he wished to establish an evidentiary foundation for the photograph by questioning one of the state's witnesses. The court held Hursey could not "lay the foundation through the opposing side's witnesses when they were not there at the time that the photograph was taken" and therefore precluded the photograph from being introduced at trial.

¶7 To "lay the foundation" to admit the photograph, Hursey was not required to call a witness who was present when the photograph was taken. *See Haight-Gyuro*, 218 Ariz. 356, ¶ 7, 186 P.3d at 35. And Hursey's attorney informed the court that, if a witness testified that the scene depicted in any photograph was "different" from the way it appeared on the day of the crimes, he would "not move to admit" that particular photograph. *See id.* (to lay foundation for admitting photograph, witness need only testify photograph accurately portrayed scene depicted). Accordingly, the trial court abused its discretion in precluding Hursey from attempting to authenticate the photograph through a state witness.

¶8 "Despite finding an abuse of discretion, we may still affirm the trial court if the error is harmless." *State v. Beasley*, 205 Ariz. 334, ¶ 27, 70 P.3d 463, 469 (App. 2003). "Harmless error review places the burden on the state to prove beyond a reasonable doubt that the error did not contribute to or affect the verdict or sentence." *State v. Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d 601, 607 (2005); *see also Beasley*, 205 Ariz. 334, ¶ 27, 70 P.3d at 469; *State v. Canaday*, 117 Ariz. 572, 575, 574 P.2d 60, 63 (App. 1977) ("error will be considered harmless if the evidence not excluded by the error provides . . . overwhelming proof of guilt").

¶9 The evidence of Hursey's guilt was overwhelming. *See* A.R.S. §§ 13-1506(A)(1), § 13-1802(A)(1). Hursey was found at the scene of the crime with items from the concession stand in the backseat of his car. Although he claimed during trial that he was not committing burglary but instead collecting scrap metal, he carried tools that could be used in a burglary, including a screwdriver, when he was arrested. Furthermore, the door to the concession stand was found "dinged up" and open, and Hursey's shoe print was found on the floor inside. Therefore, we conclude the trial court's error in precluding Hursey from asking the state's witness to authenticate the photograph did not contribute to the verdicts and thus was harmless. *See Henderson*, 210 Ariz. 561, ¶ 18, 115 P.3d at 607.

Prior Convictions

¶10 Hursey next claims the trial court erred when it allowed the state to introduce evidence of his prior felony convictions for impeachment purposes after he had introduced

his statement to the arresting officer. Hursey contends this statement was not subject to impeachment because it was not hearsay and because the state failed to provide him with adequate notice of its intent to use his prior convictions for impeachment purposes. We review a trial court's ruling on the admissibility of prior convictions for an abuse of discretion. *State v. Green*, 200 Ariz. 496, ¶ 7, 29 P.3d 271, 273 (2001).

¶11 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. As relevant here, impeachment evidence may be introduced to "discredit hearsay statements by non-testifying declarants" that have been admitted pursuant to a hearsay exception. *State v. Hernandez*, 191 Ariz. 553, ¶ 9, 959 P.2d 810, 814 (App. 1998); Ariz. R. Evid. 806. "Rule 806 'specifically permits impeachment of a hearsay statement made by an absent declarant by any means which would have been permissible had the declarant been present and testified.'" *Hernandez*, 191 Ariz. 553, ¶ 9, 959 P.2d at 814, *quoting Valencia*, 186 Ariz. at 501, 924 P.2d at 505.

¶12 At trial, Hursey moved to introduce, through testimony of the arresting officer, his statement when he was arrested that he had been collecting scrap metal. The trial court granted Hursey's motion and admitted the statement pursuant to the hearsay exception enumerated in Rule 803(3). The arresting officer subsequently testified that Hursey had told

him he had been looking for scrap metal when he was arrested, and the state then moved, pursuant to Rule 806, to impeach Hursey's statement with evidence of his prior felony convictions. The trial court granted the motion.

¶13 Citing Rule 801, Ariz. R. Evid., Hursey contends his statement was "arguably an admission by a party opponent" and for that reason did not constitute hearsay subject to impeachment under Rule 806. But "an admission by a party opponent is not hearsay . . . [only] if offered against the person who made it." *State v. Bocharski*, 200 Ariz. 50, ¶ 37, 22 P.3d 43, 51 (2001); Ariz. R. Evid. 801(d)(2). Here, the statement was not offered against Hursey; it was he who offered it in evidence. Because Hursey was attempting to offer his own statement not as an admission but instead to exculpate himself, the statement did not qualify as a party admission and is therefore hearsay, admissible only under Rule 803. Accordingly, the trial court did not err when it permitted the state to introduce Hursey's prior felony convictions as impeachment evidence pursuant to Rule 806. *See Hernandez*, 191 Ariz. 553, ¶ 10, 959 P.2d at 814 (prior felony convictions may be used to impeach a nontestifying declarant's hearsay statements).

¶14 Hursey also argues, however, that even if his statements were hearsay subject to impeachment under Rule 806, the state nevertheless failed to provide sufficient notice of its intent to impeach him using the prior convictions. But he does not cite sufficient authority on appeal to support this claim, and it is therefore waived. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Carver*, 160 Ariz. 167, 175, 771 P.2d 1382, 1390 (1989).

¶15 In any event, *Hernandez*, the single case that Hursey briefly mentions, does not compel a different conclusion. The issue in *Hernandez* was not, as Hursey claims, whether the state is required to give a defendant specific notice of its intent to impeach a hearsay statement with a prior felony conviction. Rather, *Hernandez* involved whether the trial court was required to re-weigh the probative impeachment value of a defendant's prior felony convictions when the defendant introduced his own hearsay statements, through a tape recording of a 911 telephone call and did not take the stand. 191 Ariz. 553, ¶¶ 18-20, 959 P.2d at 815-16. Hursey acknowledged the state had "disclosed that [it] would use" the alleged prior felony convictions for impeachment purposes if Hursey testified. Under *Hernandez*, this acknowledgment is sufficient to permit the state to impeach a defendant's hearsay statements. *Id.* ¶¶ 5, 18, 26 ("[a]nticipating that Defendant might testify at trial, the State moved . . . to admit Defendant's prior felony convictions for purposes of impeaching his testimony"; when defendant did not testify, state permitted to impeach his hearsay statements with prior convictions). Accordingly, the trial court did not err when it allowed the state to introduce Hursey's prior felony convictions as impeachment evidence.

Motion for New Trial

¶16 Hursey last argues the trial court erred in denying his motion for a new trial without an evidentiary hearing. We generally review such a denial for an abuse of discretion. *See State v. Spears*, 184 Ariz. 277, 289, 908 P.2d 1062, 1074 (1996). Hursey's motion for new trial, however, was based on juror misconduct that occurred before the verdict was read.

But, when the trial court invited Hursey to make a record of the misconduct, his attorney stated: "Just that we don't feel it's an issue, and we wanted to bring it to the Court's attention to address it prior to finding out what the verdict was." Therefore, Hursey waited to move for a new trial until after the jury returned an unfavorable verdict. By failing to timely raise this issue below, Hursey has forfeited all but fundamental error review. *See State v. Melcher*, 15 Ariz. App. 157, 160, 487 P.2d 3, 6 (1971) (issue raised for first time in motion for new trial not timely and therefore waived on appeal); *see also State v. Spratt*, 126 Ariz. 184, 187-88, 613 P.2d 848, 851-52 (App. 1980) (defense counsel's failure to take curative action on alleged juror misconduct during trial waived any error); *State v. Adams*, 27 Ariz. App. 389, 391, 555 P.2d 358, 360 (1976) ("[A] defendant must object when he learns of misconduct by a juror [and] is not permitted to wait until after an unfavorable verdict is returned and then complain.").

¶17 The defendant has the "burden of persuasion in fundamental error review." *Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d at 607. And Hursey does not argue that any error here was fundamental.[2] Therefore, he cannot sustain his burden in a fundamental error analysis. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008).

[2]Although Hursey briefly mentions in his reply brief that the trial court's error was fundamental, his argument is still inadequate, and arguments raised for the first time in a reply brief are waived. *See State v. Guytan*, 192 Ariz. 514, ¶ 15, 968 P.2d 587, 593 (App. 1998).

Conclusion

¶18 In light of the foregoing, we conclude the trial court did not err in permitting the state to introduce evidence of Hursey's prior felony convictions or in denying his motion for a new trial. Although the trial court erred in denying Hursey's motion to introduce several photographs, such error was harmless. We therefore affirm Hursey'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