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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THE STATE OF ARIZONA, Appellee, v. ERIC SMITH, Appellant.	2 CA-CR 2009-0380 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF GRAHAM COUNTY

Cause No. CR2009064

Honorable Robert Duber, II, Judge

AFFIRMED

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H O W A R D, Chief Judge.

¶1 After a jury trial, appellant Eric Smith was convicted of five counts of sexual conduct with a minor and two counts of child molestation. The trial court sentenced him to consecutive, mitigated prison terms totaling one hundred and thirteen years. On appeal, Smith claims the trial court erred in admitting the testimony of two witnesses and in precluding him from impeaching one of those witnesses with evidence of his prior felony conviction. For the following reasons, we affirm.

Factual and Procedural Background

¶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). Smith lived with his wife, S., and her daughter, K. When K. was approximately nine years old, Smith began to touch her inappropriately. Over time, the touching escalated into repeated instances of increasingly-serious sexual contact. K. eventually reported the conduct to her mother, but later recanted the allegations and the police were never alerted.

¶3 Several years later, Smith filed for divorce from S. S. then obtained an order of protection against Smith. K. subsequently informed the police that Smith had violated the order of protection. At that time, K. also informed police about all of Smith's earlier sexual contact. Smith was indicted on various charges, and was convicted and sentenced as noted above. This appeal followed.

Prior Consistent Statements

¶4 Smith first argues that the trial court erred by admitting the testimony of two witnesses, T.L. and J.R., because it was hearsay and consisted of inadmissible prior consistent statements.[1] He contends the statements were not admissible because he did not claim at trial that K. recently had fabricated the allegations. We review the trial court's rulings on the relevance and admissibility of evidence for an abuse of discretion. *State v. Rutledge*, 205 Ariz. 7, ¶ 15, 66 P.3d 50, 53 (2003).

¶5 Hearsay is an out-of-court statement offered for its truth and generally is not admissible. Ariz. R. Evid. 801(c), 802. However, when one party presents evidence alleging that a witness's testimony was recently fabricated, the other party generally is allowed to introduce testimony of that witness's prior consistent statements in an effort to rebut that allegation. *See* Ariz. R. Evid. 801(d)(1)(B) (prior consistent statements not hearsay when used to rebut allegation of recent fabrication).

¶6 Here, Smith's counsel questioned K. about the fact that the allegations of abuse were not included in the order of protection. He also asked pointed questions about the timing of the allegations coinciding with the dispute about money related to his divorce from K.'s mother. The trial court then found that Smith's cross-examination of

[1]Although Smith separates this issue into two arguments, the same principles of law control, and we address both arguments together.

K. had implied a charge of recent fabrication. Therefore, the court allowed T.L. and J.R. to testify to K.'s prior consistent statements in rebuttal.[2]

¶7 Despite the fact that Smith did not explicitly claim K. recently had fabricated the charges, the extent and nature of the questions that his counsel asked during his cross-examination of K. clearly justified the trial court's conclusion that Smith was implicitly alleging that K. recently had fabricated the charges. *See* Ariz. R. Evid. 801(d)(1)(B) (allegation of recent fabrication can be express or implied). Consequently, the court did not abuse its discretion by allowing the state to present evidence of K.'s prior consistent statements.

¶8 Smith also contends that the testimony should not have been admitted because K.'s prior consistent statements were made prior to her recantation of the earlier allegations of abuse. Smith cites no pertinent authority for this proposition and, indeed, the timing of the comments with respect to K.'s recantation is not relevant to their admissibility. *See* Ariz. R. Evid. 801(d)(1)(B). Therefore, this argument is without merit.

¶9 Smith mentions in his argument heading that the admission of this evidence violated his rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution and the "correlative provisions" of the Arizona Constitution. But he did not make these objections below. "And an objection on one ground does not preserve

[2]The trial court was not explicit in the reasoning for overruling Smith's hearsay objection to T.L.'s testimony, but given the context, and his later finding, this was the most likely basis—and, in any event, it is the basis the parties argue.

the issue [for appeal] on another ground." *State v. Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d 682, 683 (App. 2008). Therefore, Smith has forfeited the right to seek relief on this basis for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607 (2005) (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). And because Smith does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, this argument is waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived on appeal); *State v. Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d 641, 650 (App. 2007) (court will not ignore fundamental error if it finds it). And in any event, the issue would be waived on appeal for lack of sufficient argument. *See* Ariz. R. Crim. P. 31.13(c)(1)(vi); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (issue waived when argument insufficient to permit appellate review).

Denial of Impeachment by Prior Felony Conviction

¶10 Citing Rule 609(a), Ariz. R. Evid., Smith further argues the trial court erred in precluding him from impeaching J.R.'s testimony by introducing evidence that J.R. previously had been convicted of a felony and sentenced under A.R.S. § 13-901.01. We review de novo whether a witness's prior felony conviction, for which he has been sentenced under § 13-901.01, may be used for impeachment purposes under Rule 609(a). *See State ex rel. Romley v. Martin*, 205 Ariz. 279, ¶¶ 2, 6, n.3, 69 P.3d 1000, 1001-02 (2003).

¶11 Pursuant to Rule 609(a), a witness's prior felony conviction may be used to impeach that witness at trial only if, inter alia, "the crime . . . was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted." A defendant sentenced pursuant to § 13-901.01 is normally not eligible for imprisonment in excess of one year; rather, a defendant sentenced under this statute "shall" be placed on probation unless, inter alia, that defendant has been convicted three or more times "of personal possession of a controlled substance or drug paraphernalia." § 13-901.01(A), (H)(1). A prison term is available, however, if, inter alia, the defendant violates or refuses probation. § 13-901.01(E), (G), (H).

¶12 The witness in this case, J.R., had been convicted of three counts of possession of drug paraphernalia, all occurring on different dates. J.R. was sentenced for each count, pursuant to § 13-901.01, on the same date. The trial court therefore could have sentenced him to a term of imprisonment on the third count. *See* § 13-901(H)(1); *see also State v. Guillory*, 199 Ariz. 462, ¶ 6, 18 P.3d 1261, 1263 (App. 2001). And J.R. could have received up to one and a half years in prison. *See* A.R.S. § 13-702(D).[3]

¶13 Furthermore, our supreme court has stated that even if a first and second conviction might not be used for impeachment, a third conviction under § 13-901.01 could be used to impeach a witness's credibility. *Romley*, 205 Ariz. 279, ¶¶ 22-23, 69

[3]The Arizona criminal sentencing code has been renumbered, effective "from and after December 31, 2008." *See* 2008 Ariz. Sess. Laws, ch. 301, §§ 1-120. For ease of reference and because the renumbering included no substantive changes, *see id.* § 119, we refer in this decision to the current section numbers rather than those in effect at the time of the offense in this case.

P.3d at 1005-06. And this court recently decided that new changes to the statute would also allow a witness with only one offense under § 13-901.01 to be impeached with the prior conviction because imprisonment of more than one year is possible under certain circumstances, such as when the defendant has violated the terms of probation. *State v. Hatch*, No. 1 CA-CR 08-0821, ¶ 10, 2010 WL 3310267 (Ariz. Ct. App. Aug. 24, 2010); *see also* § 13-901.01(E), (G), (H). Accordingly, the trial court here erred when it precluded Smith from using J.R.'s prior conviction to impeach his testimony pursuant to Rule 609(a).

¶14 The state argues, however, that J.R.'s third conviction was subject to the mandatory probation provisions of § 13-901.01 because the trial court in J.R.'s case "did *not* make a finding that he had been convicted three times," which it alleges is required by the statute in order for the conviction to be punishable by imprisonment in excess of one year. *See* § 13-901.01(H). But, under *Hatch*, even a first conviction could be used for impeachment. 2010 WL 3310267 ¶ 10. Furthermore, the statute does not require the sentencing court to make an express finding, *see* § 13-901.01(H), and J.R. was sentenced on all three convictions on the same day. Requiring the court to make an express finding in such a circumstance would be a hypertechnical construction and contrary to the purpose of the statute. *See Romley*, 205 Ariz. 279, ¶¶ 22-23, 69 P.3d at 1005-06 (legislature chose to treat third drug offense more seriously than first two); *State v. Cornish*, 192 Ariz. 533, ¶ 16, 968 P.2d 606, 610 (App. 1998) ("Courts will apply constructions that make practical sense rather than hypertechnical constructions that

frustrate legislative intent."). Therefore, we reject the state's argument that the lack of an explicit finding in J.R.'s sentencing order resulted in all three convictions being subject to mandatory probation provisions.

¶15 The state further asserts that because the sentencing order listed § 13-901.01(A)-(G), and not subsection (H), among the statutes J.R. violated, § 13-901.01(H) was not one of the laws under which he was convicted. But again, *Hatch* disposes of this issue. *See* 2010 WL 3310267 ¶ 10. And § 13-901.01(H) is analogous to the "sentencing statutes" that *Romley* held were necessarily "part of 'the law under which the witness was convicted' for the purposes of Rule 609(a)(1)." 205 Ariz. 279, ¶¶ 10-12, 69 P.3d at 1003-04, *quoting* Ariz. R. Evid. 609(a)(1). Finally, Rule 609(a) does not require the sentencing court to have noted that the defendant was eligible for a term of imprisonment. It simply requires that the offense be potentially "punishable" by more than one year in prison, and J.R.'s third offense certainly was. Consequently, this argument is meritless.

¶16 Despite the trial court's error in not allowing Smith to impeach J.R. with his prior felony conviction, we "'will not reverse a conviction if an error is clearly harmless.'" *State v. Green*, 200 Ariz. 496, ¶ 21, 29 P.3d 271, 276 (2001), *quoting State v. Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d 1168, 1176 (1998). "Error is harmless if we can say beyond a reasonable doubt that it did not affect or contribute to the verdict." *Doerr*, 193 Ariz. 56, ¶ 33, 969 P.2d at 1176. On appeal, Smith is challenging his inability to dispute J.R.'s credibility at trial, which then could have discounted J.R.'s testimony that K. had made earlier allegations of sexual abuse. But, as he emphasized earlier in his opening

brief, Smith had elicited the same facts during cross-examination of K. And there was no evidence presented at trial that contradicted K.'s testimony concerning the prior allegations. Because the facts established by J.R.'s testimony were uncontested and already in evidence, the court's error was harmless because it would not have affected the verdict. *See id.*

¶17 Smith asserts, however, that the admission of J.R.'s testimony cannot be considered harmless error because of the "great weight" that the state argued the jury should place on his credibility. During closing argument, the state argued to the jurors that the case hinged on whether they believed K. or Smith and that J.R. was the most credible witness because, unlike all the other witnesses, he lacked any interest in the outcome of the case. This argument may have been an improper attempt by the state to boost K.'s credibility with a prior consistent statement, but Smith did not object during closing on that basis. And, in spite of any argument about the witnesses' credibility, the evidence that Smith is actually challenging—that K. had made earlier allegations—already had been admitted. Therefore, we cannot find that the trial court's error would have affected the jury verdict.

¶18 Smith finally contends that the trial court's refusal to allow him to impeach J.R. with his prior felony conviction was a violation of his constitutional rights. But he did not object on this basis below. And an objection on one ground does not preserve another for appeal. *Lopez*, 217 Ariz. 433, ¶ 4, 175 P.3d at 683. Therefore, Smith has forfeited the right to seek relief for all but fundamental, prejudicial error. *See Henderson*,

210 Ariz. 561, ¶¶ 19-20, 115 P.3d at 607 (failure to object to alleged error in trial court results in forfeiture of review for all but fundamental error). Furthermore, because he does not argue on appeal that the error is fundamental, and because we find no error that can be so characterized, the argument is waived. *See Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d at 140 (fundamental error argument waived on appeal); *Fernandez*, 216 Ariz. 545, ¶ 32, 169 P.3d at 650 (court will not ignore fundamental error if it finds it).

Conclusion

¶19 In light of the foregoing, we affirm Smith's convictions and sentences.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge