

IN THE  
**ARIZONA COURT OF APPEALS**  
DIVISION TWO

---

THE STATE OF ARIZONA,  
*Appellee,*

*v.*

MICHAEL EDWARD AGUILAR,  
*Appellant.*

No. 2 CA-CR 2014-0067  
Filed December 24, 2014

---

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NOT FOR PUBLICATION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); Ariz. R. Crim. P. 31.24.

---

Appeal from the Superior Court in Pima County  
No. CR20121308001  
The Honorable Javier Chon-Lopez, Judge

**AFFIRMED**

---

COUNSEL

Thomas C. Horne, Arizona Attorney General  
Joseph T. Maziarz, Section Chief Counsel, Phoenix  
By Amy M. Thorson, Assistant Attorney General, Tucson  
*Counsel for Appellee*

Barton & Storts, P.C., Tucson  
By Brick P. Storts, III  
*Counsel for Appellant*

STATE v. AGUILAR  
Decision of the Court

---

**MEMORANDUM DECISION**

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

---

ECKERSTROM, Chief Judge:

¶1 Michael Aguilar challenges his convictions for attempted armed robbery. We affirm for the reasons that follow.

**Factual and Procedural Background**

¶2 In March 2012, S.B. and his girlfriend, J.M., heard a car horn honking repeatedly outside the house in which they were staying. J.M. went outside to investigate the cause of the noise. When S.B. heard a man screaming that he was owed money, he followed J.M. outside. He then saw J.M. talking to Aguilar, who was in a car.

¶3 S.B. asked Aguilar “what the problem was,” and Aguilar replied that J.M. owed him money. When S.B. told Aguilar that he didn’t have any money, Aguilar displayed what appeared to be a pistol and pointed it at both S.B. and J.M. Aguilar stated, “I’m not leaving until I get my money and I will light this bitch up . . . if I don’t.”

¶4 J.M. retreated into the house and called 9-1-1. She informed the operator that a man outside the house had a gun. When the police arrived, they located Aguilar hiding nearby and found a BB gun in “the middle of the roadway” close by.<sup>1</sup> S.B. identified the BB gun as the weapon Aguilar had used.

---

<sup>1</sup>The weapon was referred to as both a “BB gun” and a “pellet gun.” Any distinction between the two terms is not relevant to the issues in this appeal.

STATE v. AGUILAR  
Decision of the Court

¶5 After a jury trial, Aguilar was convicted of two counts of attempted armed robbery. He was sentenced to concurrent prison terms of 11.25 years. This appeal followed.

**BB Gun Evidence**

¶6 Aguilar first challenges a statement made by Tucson Police Department Officer R.G. during his testimony that the BB gun used in the robbery was located at 207 North Arcadia. We review rulings on the admission of evidence for an abuse of discretion. *State v. Ellison*, 213 Ariz. 116, ¶ 42, 140 P.3d 899, 912 (2006).

¶7 During his testimony, Officer R.G. was asked where the BB gun had been found. He replied, "It was located by Sergeant K[.] at 207 . . . North Arcadia." Aguilar objected to this statement on the basis of hearsay, noting that R.G. "has no personal knowledge and I think it's what Sergeant K[.] told him." Aguilar claims R.G.'s statement regarding the location of the gun was hearsay because, although he did not actually say, "Sergeant K. told me the gun was located at 207 North Arcadia," R.G. was not present when the gun was found and had no personal knowledge of its location. R.G.'s statement suggested a lack of personal knowledge, rather than a repetition of another's statement, but Aguilar is correct that a statement may be deemed hearsay even if a witness does not explicitly state that he or she is repeating an out-of-court declarant's statement. *See, e.g., State v. Fisher*, 141 Ariz. 227, 246 & n.6, 686 P.2d 750, 769 & n.6 (1984) (when police officer testified about deposit to checking account, but had no firsthand knowledge, instead relying on account of another officer, testimony was hearsay); *see also* 2 Kenneth S. Broun et al., *McCormick on Evidence* § 247, at 131 (6th ed. 2006) ("[W]hen . . . from the phrasing of the testimony . . . the witness appears to be testifying on the basis of reports from others, although not to their statements . . . courts may simply apply the label 'hearsay.'").

¶8 A statement is hearsay only if offered to prove the truth of the matter asserted. Ariz. R. Evid. 801(c)(2); *State v. Tucker*, 215 Ariz. 298, ¶ 61, 160 P.3d 177, 194 (2007). Here, the state claims Officer R.G.'s statement was not offered to prove the location of the gun, but instead to explain why he had reported to the address. But

STATE v. AGUILAR  
Decision of the Court

R.G. made the statement in response to the question “Where about was [the BB gun] located at?” Aguilar’s hearsay objection immediately followed this question and answer. During the ensuing discussion between counsel and the court, the state did not claim the statement was offered to show why R.G. had reported to the address. The question of why R.G. reported to the address was not asked until after the court had overruled the hearsay objection. On the record before us, we can only conclude the statement was offered for its truth. The trial court therefore erred in admitting it.

¶9 Although the court erred in admitting this evidence, “erroneously admitted evidence is harmless in a criminal case . . . when the reviewing court is satisfied beyond a reasonable doubt that the error did not impact the verdict.” *State v. Bass*, 198 Ariz. 571, ¶ 39, 12 P.3d 796, 805 (2000). Error is harmless if the fact supported by the inadmissible evidence is “otherwise established” by untainted evidence. *Id.* ¶ 40.

¶10 Aguilar contends that without this hearsay statement, there is no firm relationship between the BB gun and himself. But even without the statement that Sergeant K. initially located the gun at 207 North Arcadia, Officer R.G.’s other testimony establishes that, when he responded to that address, he found K. there and collected a gun in the middle of the roadway. Immediately after the incident, and again at trial, S.B. identified the weapon collected by R.G. as the weapon used in the attempted robbery. The relationship between Aguilar and the gun was “otherwise established” by the evidence, and so the error was harmless. *Id.*<sup>2</sup>

---

<sup>2</sup> Aguilar also contends that, because the court essentially admitted Sergeant K.’s statement that the BB gun was found at 207 North Arcadia, and this was a testimonial statement, it violated his Sixth Amendment right to confront witnesses. Because Aguilar did not object on this basis below, our review would be limited to fundamental error. *See State v. Alvarez*, 213 Ariz. 467, ¶ 7, 143 P.3d 668, 670 (App. 2006). As discussed above, although admission of this statement was error, it was harmless error. Error that is harmless, of course, cannot be fundamental. *See State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993).

STATE v. AGUILAR  
Decision of the Court

**Disclosure Violation**

¶11 Aguilar next claims the trial court erred in not precluding a witness as a sanction for a discovery violation. “In reviewing a trial court’s choice and imposition of sanctions under [Rule 15.7, Ariz. R. Crim. P.], we will find an abuse of discretion only when ‘no reasonable judge would have reached the same result under the circumstances.’” *State v. Naranjo*, 234 Ariz. 233, ¶ 29, 321 P.3d 398, 407 (2014), quoting *State v. Armstrong*, 208 Ariz. 345, ¶ 40, 93 P.3d 1061, 1070 (2004).

¶12 Preclusion of a witness, as Aguilar acknowledges, “is rarely an appropriate sanction for a discovery violation.” *Id.* ¶ 30, quoting *State v. Delgado*, 174 Ariz. 252, 257, 848 P.2d 337, 342 (App. 1993). When considering whether preclusion of a witness is appropriate, courts should consider: “(1) how vital the precluded witness is to the proponent’s case; (2) whether the witness’s testimony will surprise or prejudice the opposing party; (3) whether bad faith or willfulness motivated the discovery violation; and (4) any other relevant circumstances.” *Id.*; accord *State v. Towery*, 186 Ariz. 168, 186, 920 P.2d 290, 308 (1996); *Jimenez v. Chavez*, 234 Ariz. 448, ¶ 17, 323 P.3d 731, 735 (App. 2014). Aguilar does not address any of these factors in his brief and therefore has not demonstrated that the trial court abused its discretion in not precluding a witness as a discovery sanction.

**Evidence S.B. Sold Heroin**

¶13 Aguilar next contends he “should have been able to ask [S.B.] if he was involved in the sale of heroin around the time of the incident” and that the court’s limitation of this evidence denied him his rights to a fair trial and confrontation of witnesses. Aguilar asserts that, because his claims raise constitutional issues, they should be reviewed de novo. However, he did not present either of

---

Aguilar also makes cursory statements that the BB gun was introduced without sufficient foundation, but has not developed any argument to this effect. Accordingly, we deem this issue waived. See *State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004).

STATE v. AGUILAR  
Decision of the Court

these arguments to the trial court, and they are waived absent fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶¶ 19-20, 115 P.3d 601, 607-08 (2005); *State v. Alvarez*, 228 Ariz. 579, ¶ 16, 269 P.3d 1203, 1207 (App. 2012) (“To preserve an argument for review, the defendant must make sufficient argument to allow the trial court to rule on the issue.”). Aguilar has not claimed fundamental error, and we find no error that can be so characterized; the argument is therefore waived. *See State v. Moreno-Medrano*, 218 Ariz. 349, ¶ 17, 185 P.3d 135, 140 (App. 2008) (fundamental error argument waived if not presented 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).

**Sufficiency of the Evidence and Confrontation Rights**

¶14 Finally, Aguilar challenges the trial court’s denial of his Rule 20, Ariz. R. Crim. P., judgment for acquittal for attempted armed robbery of J.M. He claims that the recording of J.M.’s 9-1-1 call should not have been admitted or considered, but that even including the recording, the evidence was insufficient. A motion for a judgment of acquittal pursuant to Rule 20 should only be granted “if there is no substantial evidence to warrant a conviction.” The sufficiency of the evidence is a question of law we review de novo. *State v. West*, 226 Ariz. 559, ¶ 15, 250 P.3d 1188, 1191 (2011). We “view[] the evidence in a light most favorable to sustaining the verdict,” *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993), and determine whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *West*, 226 Ariz. 559, ¶ 16, 250 P.3d at 1191, quoting *State v. Mathers*, 165 Ariz. 64, 66, 796 P.2d 866, 868 (1990).

¶15 Aguilar challenges the use of the 9-1-1 call on two grounds. First, he claims that, although the recording had been admitted into evidence at the time of the Rule 20 motion, and the trial court listened to it in ruling on the motion, it had not yet been played to the jury, and therefore should not have been considered. Even assuming arguendo that this is correct, “[a] defendant who goes forward and presents a case waives any error if his case supplies evidence missing in the state’s case.” *State v. Nunez*, 167 Ariz. 272, 279, 806 P.2d 861, 868 (1991). Aguilar played the

STATE v. AGUILAR  
Decision of the Court

recording for the jury, and the court was therefore able to consider it.

¶16 Second, Aguilar claims the 9-1-1 call should not have been admitted because the statements made in the call were testimonial and their admission violated his Sixth Amendment right to confront witnesses. Aguilar concedes he did not object to the admission of this evidence and contends we should review for fundamental error. However, he not only failed to object to this evidence, he requested that it be played to the jury. Accordingly, if any error occurred, Aguilar invited the error and cannot complain of it on appeal. *See State v. Logan*, 200 Ariz. 564, ¶ 11, 30 P.3d 631, 633 (2001) (purpose of invited error doctrine is to prevent party from inserting error into record and profiting by it on appeal).

¶17 In his ultimate challenge to the trial court's ruling on his Rule 20 motion, Aguilar argues there was insufficient evidence that he attempted to rob J.M. *See* A.R.S. §§ 13-1001, 13-1902, 13-1904(A). A person commits armed robbery by taking the property of another from his or her immediate presence, threatening or using force to take or retain the property, and being armed with a deadly weapon or a simulated deadly weapon. §§ 13-1902, 13-1904; *see State v. Large*, 234 Ariz. 274, ¶ 9, 321 P.3d 439, 442-43 (App. 2014). "The essential elements of an attempted robbery are (1) intent to commit robbery and (2) an overt act towards that commission." *State v. Williams*, 233 Ariz. 271, ¶ 7, 311 P.3d 1084, 1086 (App. 2013), *quoting State v. Leyvas*, 221 Ariz. 181, ¶ 34, 211 P.3d 1165, 1175 (App. 2009).

¶18 Aguilar appears to contend there was insufficient evidence he used or threatened to use force against J.M. But S.B. testified that Aguilar had pointed the gun at both him and J.M. We view the evidence in the light most favorable to upholding the conviction. *See id.* ¶ 6. Accordingly, sufficient evidence supported the conclusion that Aguilar threatened to use force against J.M. in an effort to make her satisfy his demand for money.

### Disposition

¶19 For all of the foregoing reasons, Aguilar's convictions and sentences are affirmed.