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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

JOHN XAVIER FAUSTO, JR., *Appellant*.

No. 1 CA-CR 16-0356
FILED 5-23-2017

Appeal from the Superior Court in Maricopa County
No. CR2014-142828-001
The Honorable Margaret R. Mahoney, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Gracynthia Claw
Counsel for Appellee

Garcia Law Firm, Phoenix
By Bernardo M. Garcia
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Peter B. Swann delivered the decision of the court, in which Judge Kent E. Cattani and Judge Donn Kessler joined.

S W A N N, Judge:

¶1 John Xavier Fausto, Jr., appeals his convictions and sentences for kidnapping, assault, and two counts of aggravated assault. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Around 1 a.m., bar patrons at Brigett’s Last Laugh saw Fausto chase his crying and frantic girlfriend, who was wearing only a tank top and had duct tape wrapped around her head, covering her mouth, and binding her wrists.¹ Several times, Fausto picked her up and flung her over his shoulder as she flailed and kicked him. Fausto fled after one of the bar patrons confronted him, while others tried to help the victim get the duct tape off. The police were contacted.

¶3 After the tape was removed, the victim exclaimed that her boyfriend was trying to kill her. She said he had beaten her and held her captive. She left a voicemail on her mother’s phone, saying “John almost killed me.” When her mother called back, she was still crying and hysterical, and told her mother “Some people here. They saved me. They helped me.” While all of this was going on, the bar patrons heard a very loud car revving up, and saw it peeling out and traveling north.

¶4 The first officer to arrive at the scene testified that the victim told him that her boyfriend became enraged when she hesitated before giving him her new phone password and then he discovered she had been texting her ex-boyfriend. He punched her and choked her several times until she was almost unconscious, and after duct-taping her mouth, ankles, and hands, dragged her into the kitchen, got an “old-school tommy gun” (one of five guns he had at the house) off the kitchen counter, then dragged her towards the garage, pointed it at her face, and said something to the

¹ We view the evidence at trial in the light most favorable to sustaining the convictions. *State v. Boozer*, 221 Ariz. 601, 601, ¶ 2 (App. 2009).

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effect of, “you f-d with the wrong guy.” He told her he was going to take her out to the desert and kill her. She told the officer that she escaped while he was in the garage. A forensic nurse examiner observed 19 injuries on the victim, including abrasions and bruises, as well as petechiae consistent with strangulation. The forensic nurse examiner spoke with the victim at length and provided a “nursing diagnosis” as well as a safety plan for the victim.

¶5 Police apprehended and arrested Fausto at a rental car center. They found \$3,000 cash in his pocket, and discovered he had rented a car.

¶6 The victim failed to appear as a witness at trial. Fausto testified the two resumed their relationship three weeks before trial. He testified that they had signed a “Fifty Shades of Grey” contract about seven months before this incident, in which he was the dominant person and the victim was the submissive person. He testified he did not threaten the victim with a gun, but the duct-taping and strangulation were consensual and occurred during sex. He claimed that he saw a text message from her ex-boyfriend while they were having sex and threatened, “If you talk to [him] again, I’m going to fucking take you out to the fucking desert . . . I’m done.” He claimed she was “freaking out,” and when he was in the garage getting ready to leave she ran out of the house.

¶7 The forensic nurse examiner testified, relating her conversation with the victim in which the victim described in detail the assault and her escape. The forensic nurse examiner also read a portion of the victim’s transcribed statement.

¶8 The jury convicted Fausto of kidnapping and aggravated assault, both dangerous offenses; aggravated assault (strangulation); and assault (punching). The court sentenced Fausto to mitigated terms totaling eight years, and imposed three years’ supervised probation on release from prison. Fausto timely appeals.

DISCUSSION

I. THE VICTIM’S STATEMENTS TO THE FORENSIC NURSE EXAMINER WERE PROPERLY ADMITTED.

¶9 Fausto argues that the forensic nurse examiner’s testimony concerning the victim’s statements violated his confrontation rights, because the primary purpose of the exam was to develop evidence at trial and not to provide medical diagnosis or treatment. Fausto objected at trial on the same grounds. The court overruled the objections and denied a motion to strike the forensic nurse examiner’s testimony. We review

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evidentiary rulings that implicate the Confrontation Clause de novo. *State v. Ellison*, 213 Ariz. 116, 129, ¶ 42 (2006).

¶10 The Confrontation Clause prohibits the “admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination.” *Crawford v. Washington*, 541 U.S. 36, 53–54 (2004). In determining whether a statement made during a police interrogation is testimonial, we consider whether the circumstances objectively indicate the primary purpose of the interrogation was “to enable police assistance to meet an ongoing emergency,” or “to establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822 (2006). In *Michigan v. Bryant*, the Supreme Court clarified the primary purpose analysis:

An objective analysis of the circumstances of an encounter and the statements and actions of parties to it provides the most accurate assessment of the “primary purpose of the interrogation.” The circumstances in which an encounter occurs – e.g., at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards – are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subject or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.

562 U.S. 344, 360 (2011) (footnote omitted).

Because forensic medical examinations often have two purposes – to gather evidence for a criminal investigation and to provide medical care to the victim – whether a victim’s statement in response to a question by the examiner is testimonial for purposes of the Confrontation Clause turns on whether the surrounding circumstances, objectively viewed, show that the primary purpose of the exchange at issue was to provide medical care or to gather evidence.

State v. Hill, 236 Ariz. 162, 167, ¶ 19 (App. 2014). Among the factors relevant to this inquiry are the setting, including police presence; the context in

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which the questions are asked; and any diagnosis or treatment recommendations made. *See id.* at 167-69, ¶¶ 22-25.

¶11 We conclude that the primary purpose of the exchange at issue here was to provide medical care, not to gather evidence. The forensic nurse examiner described the setting in which she examined the victim as similar to a doctor's office, "with special equipment to treat those patients." Although the victim was transported to the center by police, and the officer ostensibly referred to the center as "our office," no law enforcement officers were present for the examination, and the officer who suggested it said the examination was "for [her] own good to make sure nothing is actually wrong." The victim consented to the examination and was cooperative. And although the victim already had been examined at and discharged from a hospital emergency room, we cannot say that the statements were necessarily testimonial because the victim had already received urgent care. "If the primary purpose of the encounter is the provision and receipt of medical care, the statement is non-testimonial, regardless of whether the care sought is for an emergent condition." *Id.* at 167-68, ¶ 22.

¶12 The forensic nurse examiner testified that her questions to the victim were designed, not to gather evidence for police, but "to assess the patient and make a plan of care and provide an evaluation of that care." The nature of her questions and the victim's responses support this characterization of the exchange. At the start of the examination, the forensic nurse examiner asked the victim, as she does every patient, "Why are you here today?" As this court has previously noted, this type of question is standard at the beginning of any medical examination. *See id.* at 168, ¶ 24. The victim responded with a summary of what started the incident, and provided a detailed description of the assault and her escape and rescue. The forensic nurse examiner read a portion of the victim's statement to the jury. The statement as read to the jury was as follows:

My boyfriend wanted to go through my phone and I didn't let him. He started punching me on both sides of my face with his fist. He started strangling me asking me for my password, so I finally gave him my password. Then he looked through my phone and got mad when he saw I was talking to my ex. Then he started hitting me in my face over and over again. He strangled me at least five times until right before I was going to pass out. I was drooling, coughing, and gasping for air each time he let me go. My eyes were rolling in the back of my head and I felt lightheaded.

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He said he was going to take me out to the desert and kill me. He dragged me to the kitchen and tried to duct tape my mouth, but I kept getting away. Then he threw me on the couch and duct taped around my head and mouth, my hands around my back and my feet together. He threw me against the couch and duct taped -- no sorry -- against the door.

He got his gun and said, "You played the wrong person, honey," and left. He went in the garage to his car and I slipped a hand out of the tape and unwrapped my legs really fast. As soon as I could, ran across the street to Brigett's bar. He chased me and tackled me in the parking lot. Two guys in the parking lot saw me and he told them we were playing around, but I was screaming through the duct tape around my mouth and they finally helped me. He ran back home.

The forensic nurse examiner then asked "more direct questions about what happened specifically followed by my head-to-toe assessment." She testified that the follow-up questions are "more focused to direct my care." For example, she created a body map of the injuries, and wrote down what the victim said might have caused each injury. She also testified that she obtained the identity of the assailant, because of its potential importance in crafting a safety plan for the victim in case of future similar incidents, or "[i]f a similar situation should occur, how to get out of the situation."

¶13 Finally, although the forensic nurse examiner was not asked to provide details of her medical diagnosis and treatment plan, she testified she did provide a "nursing diagnosis," and crafted a safety plan for the victim, and reviewed it with her.

¶14 The totality of these circumstances, objectively viewed, demonstrate the primary purpose of the exchange that produced the statements at issue was to provide medical diagnosis and treatment, and accordingly the statements were not testimonial and admission of them at trial did not violate Fausto's confrontation rights.

II. THE SUPERIOR COURT DID NOT ABUSE ITS DISCRETION BY ADMITTING THE WEAPONS EVIDENCE.

¶15 Fausto argues that the court abused its discretion in admitting evidence of two rifles, multiple calibers of ammunition, and multiple photographs of these same weapons and accessories, because any relevance was substantially outweighed by unfair prejudice from the "sheer quantity

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of weapons evidence,” none of which he argues matched the victim’s description of the gun used to threaten her.

¶16 The court overruled Fausto’s objections to this effect at trial, reasoning that evidence of the weapons and multiple magazines and boxes of ammunition seized from Fausto’s vehicle and residence were relevant to prove “reasonable apprehension” aggravated assault with a firearm as charged in Count 2, and not unfairly prejudicial because they depicted only two rifles, either of which could have been used to threaten the victim. We review a trial court’s decision to admit evidence for abuse of discretion. *State v. Smith*, 215 Ariz. 221, 228, ¶ 20 (2007).

¶17 We cannot say that the court abused its discretion. The evidence of the rifles and the gun-related items throughout the house, including on the kitchen counter and the bedside table was significantly probative of whether Fausto used a gun to place the victim “in reasonable apprehension of imminent physical injury,” as necessary to prove him guilty of the aggravated assault charged in Count 2. *See* A.R.S. §§ 13-1203(A)(2), -1204(B). The items themselves, as well as the photographs depicting where they were found in the house, showed that Fausto had immediate access to at least two deadly weapons and ammunition to carry out his threat to kill the victim. Either one of the rifles found could have fit the description of the “old-school tommy gun” that the victim said Fausto used to threaten her. Although she had described the gun as a “handgun,” she had explained that it had “drum-like magazines” with “two circular places to store ammunition attached to the one clip.” Both rifles discovered at the house had “drum-like magazines.” Police also seized an empty holster, which the photographs showed was on the kitchen counter, and could have held a handgun used to threaten the victim. The boxes of ammunition and other gun-related accessories throughout the house also lent credibility to the victim’s statement to the officer that Fausto had three rifles and two handguns at the house, three more weapons than police found. Under these circumstances, it was not unreasonable for the court to conclude that this evidence’s probative value was not substantially outweighed by any tendency from its cumulative nature to unfairly prejudice Fausto. *See* Ariz. R. Evid. 403.

III. INEFFECTIVE ASSISTANCE OF COUNSEL IS NOT REVIEWABLE ON DIRECT APPEAL.

¶18 Fausto finally argues that his attorney was ineffective because he failed to raise his mental health history as a possible defense before trial. He concedes, however, as he must, that this claim is not cognizable on direct

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appeal. *See State v. Spreitz*, 202 Ariz. 1, 3, ¶ 9 (2002) (holding that “ineffective assistance of counsel claims are to be brought in Rule 32 proceedings” and “will not be addressed by appellate courts regardless of merit”). We accordingly do not address it.

CONCLUSION

¶19 For the foregoing reasons, we affirm Fausto’s convictions and sentences.



AMY M. WOOD • Clerk of the Court
FILED: AA