DIVISION ONE
FILED: 07-01-2010
PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-0814
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	
VICTOR SALVATORE TRAMAGLINO,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	

Appeal from the Superior Court in Mohave County

Cause No. CR2007-1174

The Honorable Steven F. Conn, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Melissa M. Swearingen, Assistant Attorney General
Attorneys for Appellee

Jill L. Evans, Mohave County Appellate Defender — Kingman
Attorney for Appellant

O R O Z C O, Judge

¶1 Victor Salvatore Tramaglino (Defendant) appeals his conviction and sentence for unlawful imprisonment by domestic

violence, a class 6 felony and dangerous offense. He claims the trial court erred in admitting recordings of 911 calls made by the victim and a third party. Defendant argues that, because the victim and the other caller did not testify at trial, Defendant was denied his constitutional right to confront them.[1] For the following reasons, we find no reversible error and therefore affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 "[W]e view the evidence in the light most favorable to sustaining the verdict and resolve all reasonable inferences against the defendant." *State v. Latham*, 223 Ariz. 70, ___, ¶ 9, 219 P.3d 280, 282 (App. 2009) (quoting *State v. Mincey*, 141 Ariz. 425, 432, 687 P.2d 1180, 1187 (1984)).

¶3 During the late evening of July 28, 2007, M.C. fled the residence she shared with Defendant, her boyfriend, while he showered. Defendant searched for M.C. and learned she may have gone to a house party. Defendant went to the party. Finding her in a room next to the kitchen, Defendant pulled a handgun from the waist of his pants. He waived and pointed the handgun to keep people at bay while he dragged M.C. at gunpoint from the home. M.C. was "screaming and crying, fighting."

¶4 Witnesses testified that after Defendant left the party, four individuals also left the residence and attempted to

[1] *See* U.S. Const. amend. VI.

locate Defendant and M.C. One of the four, M.G., called 911 to report the incident and their current location. M.G. also told the 911 operator Defendant and M.C. ended their relationship earlier that evening, she gave Defendant's first name, described his vehicle and the direction he was driving when he left the party.

¶5 Defendant testified that after he left the party, he drove with M.C. to his place of business. When he exited the vehicle and entered the shop to open the garage door, M.C. fled to a nearby residence. M.C. called 911 and reported she was the victim of the incident at the party. She also described Defendant's vehicle, provided the 911 operator with her current location and the location of Defendant's business. During a subsequent interview, police noticed injuries to M.C.'s face that a witness testified were not evident at the party.

¶6 Defendant was apprehended and charged with one count of kidnapping by domestic violence, a class two felony; aggravated assault by domestic violence, a class three felony; and five counts of aggravated assault,[2] class three felonies. At trial, neither M.G. nor M.C. testified. Over Defendant's

[2] The State alleged Defendant pointed the gun at five specific individuals while he looked for and abducted M.C. at the party.

objection on Sixth Amendment[3] grounds, the court admitted the recordings of the two 911 calls into evidence. The jury found Defendant not guilty on all counts as charged, but found him guilty of the lesser-included offense of unlawful imprisonment by domestic violence, a dangerous offense. The court sentenced Defendant to a mitigated term of 1.5 years' imprisonment, and Defendant timely appealed. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution, and Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003), 13-4031 and -4033.A.1 (2010).[4]

DISCUSSION

¶7 In *Crawford v. Washington*, 541 U.S. 36, 68 (2004), the Supreme Court held that the Confrontation Clause bars the admission of testimonial statements of a witness who did not testify at trial unless the witness was unavailable to testify and the defendant was given a prior opportunity to cross-examine the witness. Although we generally review a trial court's ruling on the admissibility of evidence for a clear abuse of discretion, we review challenges to admissibility based on the

[3] "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ." U.S. Const. amend. VI.

[4] Unless otherwise specified, we cite to the current version of the applicable statutes as no revisions material to this decision have since occurred.

Confrontation Clause de novo. *State v. King*, 212 Ariz. 372, 375, ¶ 16, 132 P.3d 311, 314 (App. 2006).

¶8 Defendant contends the 911 calls in this case, or at least portions of the calls, were testimonial and thus inadmissible under the Confrontation Clause. *See Davis v. Washington*, 547 U.S. 813, 822 (2006). Defendant asserts that because the calls occurred subsequent to the incident at the party, they were not "cries for help" in response to an ongoing emergency and were therefore inadmissible. *See id.* (holding nontestimonial statements are statements made during a police interrogation where the primary purpose is to assist police to meet an ongoing emergency; testimonial statements result where there is no ongoing emergency, and the primary purpose of the interrogation is to establish information relevant to later criminal prosecution); *see also King*, 212 Ariz. at 378, ¶ 29, 132 P.3d at 317 ("9-1-1 calls that are primarily 'loud cries for help' are nontestimonial."). In response, the State argues that the 911 calls were made out of concern for M.C.'s safety, which constituted an ongoing emergency. Accordingly, the State reasons the calls were properly admitted as nontestimonial "cries for help."

¶9 We need not resolve this issue because, assuming without deciding that the court erred[5] in admitting some or all of the witnesses' statements in the 911 recordings, any error was harmless. *See King*, 212 Ariz. at 380, ¶ 36, 132 P.3d at 319 ("Confrontation Clause violations are subject to harmless error analysis."); *see also Davis*, 547 U.S. at 828 (noting a conversation that starts as an interrogation to determine the need for emergency assistance can evolve into a testimonial statement). "Error, be it constitutional or otherwise, is harmless if we can say, beyond a reasonable doubt, that the error did not contribute to or affect the verdict." *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993).

¶10 Defendant was found guilty of unlawful imprisonment by domestic violence, a dangerous offense. Here, the evidence presented at trial, without the 911 calls, overwhelmingly indicates that Defendant knowingly restrained M.C. *See* A.R.S. §§ 13-1303.A ("A person commits unlawful imprisonment by knowingly restraining another person."), -1301.2 (2010)

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[5] We note that, to the extent the trial court ruled witness statements made during 911 calls are *per se* nontestimonial, the court erred. *See State v. Alvarez*, 213 Ariz. 467, 471, ¶ 14, 143 P.3d 668, 672 (App. 2006) ("The question of whether a statement is testimonial 'is a factually driven inquiry and must be determined on a case-by-case basis.'") (quoting *State v. Parks*, 211 Ariz. 19, 28, ¶ 43, 116 P.3d 631, 640 (App. 2005)); *see also King*, 212 Ariz. at 379, ¶ 32, 132 P.3d at 318 (noting 911 calls may include both testimonial and nontestimonial statements thus requiring the court to evaluate statements separately).

("'Restrain' means to restrict a person's movements without consent" through the use of, for example, physical force by "moving such person from one place to another or by confining such a person.").[6] Four witnesses to the incident at the party described Defendant's use of physical force to "drag" or "pull" M.C. from the residence at gunpoint. *Supra* ¶ 3. Although Defendant testified M.C. left the party with him willingly, this testimony was vitiated by Defendant's further testimony that M.C. fled his truck in defiance of his instruction to her that she should remain when he exited the vehicle to open his shop's garage door.

¶11 Thus, the 911 recordings did not constitute the only evidence against Defendant and we can say beyond a reasonable doubt that the jury would have reached the same result had the recordings of the 911 calls not been admitted. *C.f. King*, 212 Ariz. at 380, ¶ 36, 132 P.3d at 319 (concluding error in admitting statements made during 911 call was not harmless because those statements were the primary evidence against the defendant). Accordingly, any purported violation of Defendant's Confrontation Rights was harmless error. *See Harrington v. California*, 395 U.S. 250, 256 (1969) ("[C]onstitutional error in

[6] It was undisputed at trial that Defendant and M.C. were romantically involved in 2007 and shared the same household, thus qualifying the crimes against M.C. as domestic violence. *See* A.R.S. § 13-3601.A.1, A.6 (2010).

the trial of a criminal offense may be held harmless if there is 'overwhelming' untainted evidence to support the conviction.").

CONCLUSION

¶12 For the reasons discussed above, Defendant's conviction and sentence are affirmed.

/S/
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PATRICIA A. OROZCO, Presiding Judge

CONCURRING:

/S/
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DANIEL A. BARKER, Judge

/S/
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LAWRENCE F. WINTHROP, Judge