DIVISION ONE
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 08-0911
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
FERMIN ANTONIO DE LA ROSA, JR,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	
	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2007-109517-001 DT

The Honorable John R. Ditsworth, Judge

AFFIRMED

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

Susan Sherwin, Maricopa County Legal Advocate — Phoenix
By Frances J. Gray, Deputy Legal Advocate
Attorneys for Appellant

S W A N N, Judge

¶1 Fermin Antonio De La Rosa, Jr., ("defendant") appeals his conviction and sentence for second degree murder, aggravated assault, drive by shooting, and discharge of a firearm at a structure, on the ground the trial court violated his rights under the Confrontation Clause by admitting statements made by the decedent shortly before his murder. For the reasons that follow, we find no reversible error, and affirm.

Factual[1] and Procedural History

¶2 The evidence at trial showed that on the night of February 8, 2007, Carlos J. and his girlfriend, Stephanie S., stopped at a traffic light at 40th Street and Southern Avenue in Phoenix. The driver of a white four-door car stopped in the lane next to them and asked Carlos where he had been, and if he was hiding from him. Stephanie recognized the driver's voice as that of defendant, an acquaintance, and saw his face as she looked back through a window. When the light changed and they drove toward Carlos's home near 40th Street and Vineyard Avenue, she and Carlos confirmed that the other driver was defendant. When they reached Carlos's house, they exited his truck and started walking toward the front door. Stephanie saw defendant

[1] "We view the evidence in the light most favorable to sustaining the verdicts and resolve all inferences against appellant." *State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997) (citation omitted).

in the same car driving toward the house and said, "[T]hat's him again," and Carlos said, "[Y]eah, just come on, just keep on walking with me. Let's go inside." When the two were at the door, Stephanie saw defendant point a gun through the open window of his car and start shooting at them. She yelled to Carlos to get down. One of the nine or ten shots fired struck the back of Carlos's head and killed him. Other bullets went inside the house, splintering wood, breaking glass and knickknacks, passing through the refrigerator, and hitting the television.

¶3 Carlos's father testified that immediately after the shooting, Stephanie ran into the house, yelling, "It was Fermin, it was Fermin." She told police at the scene, and later that night, that defendant was the shooter, identified a photograph of him, and described the vehicle he had been driving. Two weeks after the shooting, and at trial, she identified a picture of defendant's Chevrolet Impala as the car she saw him driving that night. Three people in the neighborhood who witnessed the shooting also identified a picture of defendant's Impala as matching the characteristics of the vehicle that they saw immediately before the shots were fired. A forensic scientist testified that two of three elements of firearm residue were present in defendant's vehicle, indicating that it was highly probable that a gun had been fired from the vehicle.

¶4 De La Rosa defended on the basis of misidentification and alibi; his girlfriend testified that she saw him waiting in the parking lot of her workplace at the I-10 freeway and Ray Road at the time of the shooting. The jury convicted defendant of second-degree murder as a lesser-included offense of the charged crime of first-degree murder, aggravated assault, drive by shooting, and discharge of a firearm at a structure. The judge sentenced him to prison for a term totaling 25 years. Defendant timely appealed.

Discussion

¶5 Defendant argues that the trial court violated his right to confront the witnesses against him when it admitted the decedent's out-of-court statements. Specifically, defendant argues that the court reversibly erred in allowing Stephanie to testify: 1) When they drove away from the traffic light at 40th Street and Southern Avenue, she commented to Carlos, "[O]h, that was Fermin," and he responded, "[Y]eah, that was him."; and 2) as they walked to the door of his house, she said, "[T]hat's him again, and Carlos responded, "[Y]eah, just come on, just keep on walking with me. Let's go inside." The judge ruled that these statements by the decedent were admissible under the present sense impression exception to the prohibition against hearsay. And because they were non-testimonial, the court reasoned that their admission could not violate the Confrontation Clause. We

review challenges to the admissibility of evidence under the Confrontation Clause *de novo*. *State v. King*, 212 Ariz. 372, 375, ¶ 16, 132 P.3d 311, 314 (App. 2006).

¶6 In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause prohibited the admission of "testimonial hearsay" from a witness who did not appear at trial, unless the proponent could show that the declarant was unavailable to testify, and that the defendant had had a prior opportunity to cross-examine him. *See id.* at 68. "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations on hearsay evidence, is not subject to the Confrontation Clause." *Davis v. Washington*, 547 U.S. 813, 821 (2006).

¶7 The Court declined to provide a comprehensive definition of "testimonial," but it noted that testimony "is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" *Crawford*, 541 U.S. at 51 (citation omitted) (alteration in original). Statements taken during a police interrogation are testimonial for purposes of the Confrontation Clause when "there is no . . . ongoing emergency, and . . . the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis*, 547 U.S. at

822. As the Court explained in *Crawford*, "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." 541 U.S. at 51. A statement to police, however, is considered non-testimonial when it describes current circumstances requiring assistance and is not "designed primarily to 'establis[h] or prov[e]' some past fact." *Davis*, 547 U.S. at 827 (alterations in original).

¶8 "The question of whether a statement is testimonial 'is a factually driven inquiry and must be determined on a case-by-case basis.'" *State v. Alvarez,* 213 Ariz. 467, 471, ¶ 14, 143 P.3d 668, 672 (App. 2006) (quoting *State v. Parks,* 211 Ariz. 19, 28, ¶ 43, 116 P.3d 631, 640 (App. 2005)). We review the facts bearing on the confrontation issue in the light most favorable to the proponent of the challenged evidence. *Id.* at 468, ¶ 3, 143 P.3d at 669.

¶9 We find that the statements at issue in this case were not testimonial as contemplated by *Crawford* because whatever the victim's intent in confirming defendant's identity to his girlfriend, he did not make these remarks for the purpose of establishing or proving some past fact at the trial of his murderer. In the first instance, Carlos simply confirmed to Stephanie that the other driver who had confronted him at the stoplight was defendant; in the second, he confirmed that it was

again defendant driving toward the house and suggested that she "keep on walking with me" and "[l]et's go inside." In each case, Carlos made the remarks privately -- to Stephanie, before any crime had occurred -- simply for the purpose of informing her of what was happening, and, in the case of the latter remarks, what to do about it.

¶10 The circumstances in this case are like those in *State v. Damper*, 223 Ariz. 572, 225 P.3d 1148 (App. 2010). In *Damper*, shortly before her murder, the victim sent a text message to a girlfriend asking, "Can you come over? Me and Marcus are fighting and I have no gas." *Id.* at 574, ¶ 6, 225 P.3d at 1150. The defendant argued on appeal that a text message is by nature testimonial, and because there had been a previous domestic violence incident between himself and the sender, the sender had intended this particular text message to serve as a record of the argument. *Id.* at 575, ¶ 11, 225 P.3d at 1151. We rejected both arguments, finding that text messages are not necessarily testimonial, and the text message at issue was not testimonial because the content and circumstances demonstrated that it was not sent "for the purpose of establishing or proving some fact." *Id.* at 575-76, ¶ 12, 225 P.3d at 1151-52. Similarly, neither the circumstances nor the content of Carlos's remarks to Stephanie suggest that they were made "for the purpose of establishing or proving some fact." *See id*. These casual

remarks were not testimonial statements, and therefore, their admission at trial did not violate the Confrontation Clause.

¶11 The essence of defendant's argument appears to be that we should ignore or overrule the holding of *Crawford* to the effect that the Confrontation Clause protects a defendant only against the admission of *testimonial* hearsay from absent witnesses, and traditional evidentiary rules are adequate to protect against the admission of *non*-testimonial hearsay from absent witnesses. *See Crawford,* 541 U.S. at 68. Defendant argues that we should find that his rights were violated simply because he was unable to cross-examine a key witness whose statements were used *against* him. We fail to find any ground on which the holding of *Crawford* would not apply in this case.

Conclusion

¶12 For the foregoing reasons, we affirm appellant's conviction and sentence.

/S/
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PETER B. SWANN, Judge

CONCURRING:

/S/
_____
PATRICIA K. NORRIS, Presiding Judge

/S/
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DANIEL A. BARKER, Judge