IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

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FILED: 04/29/10
PHILIP G. URRY, CLERK
BY: JT

STATE OF ARIZONA,	)	1 CA-CR 08-1033
	)	
Appellee,	)	DEPARTMENT A
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication –
JAIME PEREZ MUNOZ,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-118612-001 DT

The Honorable Susan M. Brnovich, 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

Droban & Company, P.C. — Anthem
By Kerrie M. Droban
Attorney for Appellant

W I N T H R O P, Judge

¶1 Jaime Perez Munoz ("Appellant") appeals his convictions for one count of kidnapping, one count of sexual

assault, and two counts of attempted sexual assault. On appeal, he argues that the trial court (1) abused its discretion in admitting the victim's statements to a neighbor ("Ernie S."), pursuant to the excited utterance exception to the hearsay rule; (2) committed fundamental error in admitting statements the victim made to a nurse through a Spanish interpreter because the interpreter did not testify at trial; and (3) abused its discretion in denying his motion to vacate judgment. For the reasons set forth below, we affirm.

FACTS AND PROCEDURAL HISTORY[1]

¶2 The victim, a Spanish-only speaker, lived with Appellant, her adult son, in a Phoenix apartment.[2] Sometime after 1:00 a.m. on March 23, 2008, Appellant approached his mother as she exited the shower, "gagged" her by placing his hand over her mouth, pushed her to the floor, and told her not to say anything or he would hit her. He then tried to penetrate her vagina with his penis but could not do so. He next placed his penis in her mouth, and when she tried to get up, he pushed her back down. He tried again to put his penis inside her

[1] On appeal, we view the evidence in the light most favorable to sustaining the convictions and resolve all inferences against Appellant. *See State v. Nihiser*, 191 Ariz. 199, 201, 953 P.2d 1252, 1254 (App. 1997).

[2] At the time of the incidents that are the subject of this appeal, Appellant was forty-one years old and his mother was sixty-six years old.

vagina, but was incapable of getting it past her vulva because he could not get an erection. The victim ultimately escaped from the apartment by pushing a screen out of a bedroom window.

¶3 Shortly thereafter, Ernie S., who also lived in the apartment complex, was returning home when he noticed the victim attempting to communicate with a neighbor who spoke no Spanish. He could tell by the victim's face that something was wrong because she looked "terrified. She just looked very, very scared." When the victim saw him, she said "ayuda," meaning "help" in Spanish. He told her that he spoke Spanish, and the victim "seemed to kind of cool down" or at least not get worse "because she finally found somebody to help her."

¶4 Speaking in Spanish, the victim exclaimed, "My son just raped me." She was still "unbelievably frightened" and "would like duck after she would hear any sound, and . . . would say, 'Is that him?'" Ernie S. offered to call the police or security, but the victim informed him that she did not wish to do so "because it's my son." Instead, she used his telephone to call her employer and her niece before asking Ernie S. if he would drive her to her niece's house. As he drove, the victim, who was crying hysterically, made many statements, including: "I can't believe he did this to me. He's never done anything like this before. He –- I mean he's never disrespected me[.]"

¶5 When they arrived at her niece's house, the victim requested that Ernie S. accompany her to the front door because she was afraid to walk there on her own. Her niece testified at trial that the victim was very upset, scared, and crying, but she eventually managed to "open up" and explain what had happened. The victim's niece's husband called the police.

¶6 A Phoenix police detective interviewed the victim later that morning. During the interview, the victim constantly used tissues to wipe her mouth. The detective noticed injuries on the victim's face, the side of her nose, her mouth and lip, and her right shoulder. The detective subsequently arranged a confrontation call between the victim and Appellant, using the assistance of a Spanish-speaking officer. Because the victim was still very upset, however, the confrontation call proved difficult. The victim would speak rapidly and often ask one question after the other without permitting Appellant to respond. Further, most of Appellant's responses during the telephone call were "vague." Appellant neither admitted nor denied the allegations his mother made; instead, he often responded with silence or took a long time to respond - and then only stated that he had "psychological problems" or "had too much to drink" or thought he "was dreaming." At one point, Appellant stated that he was not aware of what he was doing until he "woke up" and saw the expression on his mother's face.

¶7 During the call, the victim asked Appellant how he thought she felt. Appellant replied, "I already feel like a dog." He stated that he wanted her to call the police and he would wait for them at his apartment. When the victim asked why she should call the police, Appellant replied, "I deserve to go to jail."

¶8 After the confrontation call, Appellant called his ex-wife and informed her that he had done "something wrong" to his mother. When questioned if he had hit her, Appellant stated, "I did something worse." After Appellant hung up the phone, his ex-wife became concerned because he had sounded "so depressed." She was in the midst of a conversation with a suicide line when Appellant called back and informed her that the police were there, he had a knife, and he was going to kill himself. He then hung up the phone.

¶9 Appellant was on the balcony of his apartment when police officers arrived. He then went inside the apartment and announced that he had a knife and planned to kill himself. Nonetheless, the officers were able to arrest Appellant after making a forced entry into the apartment. While there, they noticed that a screen had been removed from a bedroom window and was lying on the bed.

¶10 The detective interviewed Appellant at approximately 6:50 p.m. that day. Appellant, who had scratches on his face,

stated that his girlfriend had come over the previous evening and he had become "very intoxicated from drinking alcohol." He acknowledged that, in her confrontation call to him, his mother "had accused him of doing horrible things to her," but he claimed he could not remember what had happened. However, he also told the detective that his mother was "an honest woman," and he acknowledged that, if she said "it happened," then the police could assume what she said was true.

¶11 When asked about the scratches on his face, Appellant stated that "they were probably from the struggle" with his mother, although he agreed it was "possible" that they were the result of "rough sex" with his girlfriend. At one point, Appellant appeared to concede that he "put his penis in [his mother's] mouth" and forced her to perform oral sex on him, which was what his girlfriend did when he could not get an erection. Appellant also indicated that he had tried to have vaginal sex with his mother, although he qualified this by adding "if that's what she is telling you." When asked "why he thought he did it," Appellant said it was "because of the things his mother had said to him." He stated that "he believed that he [had] done these things because he [] believed . . . what his mother said." Throughout the interview, however, Appellant neither fully admitted nor categorically denied having sexually assaulted his mother.

¶12 Meanwhile, that same afternoon, the victim was interviewed by a registered nurse at Scottsdale Health Care as part of a forensic medical examination. The nurse carried out the interview with the assistance of a Spanish interpreter, who was available telephonically via a company called Cirricom, with which Scottsdale Health Care contracted for translation services. During the interview, the victim told the nurse that Appellant had gagged her and pushed her to the floor, twice attempted to penetrate her vaginally, and forced her to put his penis in her mouth.

¶13 A grand jury issued an indictment, charging Appellant with Count I, kidnapping, a class two felony; Count II, attempted sexual assault, a class three felony; Count III, sexual assault, a class two felony; and Count IV, attempted sexual assault, a class three felony. *See* Ariz. Rev. Stat. ("A.R.S.") §§ 13-1304 (2010), -1001 (2010), -1406 (2010).[3] A jury found Appellant guilty of all charged offenses.

¶14 The trial court sentenced Appellant to concurrent, presumptive terms of 5 years' imprisonment in the Arizona Department of Corrections for Count I, 3.5 years' imprisonment for Count II, and a flat-time sentence of 7 years' imprisonment for Count III, and credited Appellant for 243 days of pre-

[3] We cite the current version of the applicable statutes if no changes material to our analysis have since occurred.

sentence incarceration. The court suspended sentencing for Count IV and imposed a term of lifetime probation upon absolute discharge from prison for Counts I through III.

¶15 We have jurisdiction over Appellant's timely appeal pursuant to the Arizona Constitution, Article 6, Section 9, and A.R.S. §§ 12-120.21(A)(1) (2003), 13-4031 (2010), and 13-4033 (2010).

ANALYSIS

I. Excited Utterance

¶16 Appellant argues that the trial court erred when it admitted under the excited utterance exception to the hearsay rule, *see* Ariz. R. Evid. 803(2), the victim's statements to Ernie S. after she stated, "My son just raped me." Appellant's challenge is directed at the following statements: "I can't believe he did this to me. He's never done anything like this before. He -- I mean he's never disrespected me[.]" Appellant further challenges the following testimony from Ernie S.: "[S]he was telling me how it happened. She said that she was taking a shower, and then she walked out, and that's when the act happened . . . [and] she said, 'He had me down, and he said, "Do not say anything or I'll – or I'll hit you."'"

¶17 Appellant contends that the trial court erred in ruling these statements were excited utterances because the statements were made in Ernie S.'s car on the drive to the

victim's niece's house and therefore "uttered hours after the purported rape when the victim was no longer under the stress of the excitement caused by the event or condition." We find that the trial court properly admitted the statements.

¶18 A statement qualifies as an excited utterance if it relates to a startling event or condition and is made while the declarant is under the stress of excitement caused by that event or condition. *State v. Cruz*, 218 Ariz. 149, 161, ¶ 54, 181 P.3d 196, 208 (2008) (citing Ariz. R. Evid. 803(2)). Although the length of time between a statement and an event is an important factor to consider in determining the application of this exception, the length of time the stress may last varies among individuals in accordance with the nature of the event that produced the stress. *See State v. Rivera*, 139 Ariz. 409, 411, 678 P.2d 1373, 1375 (1984). Thus, "there have been no fixed time limits set to determine whether a statement will qualify as an excited utterance." *Id*. (citation omitted).

¶19 "Incidents involving rape or other sexual offenses have long been viewed as presenting unique circumstances when the spontaneous utterance exception is sought to be applied." *Id*. at 412, 678 P.2d at 1376 (citation omitted). Generally, in such instances, "a less demanding time aspect is required." *Id*. (citation omitted). Ultimately, the true test is not when the statement was made, but whether, under the circumstances of the

particular statement, the speaker may be deemed to be speaking under the stress of the nervous excitement and shock produced by the event at issue. *Id*. at 411-12, 678 P.2d at 1375-76 (citations omitted). The testimony at trial supports the trial court's ruling that the victim's statements were excited utterances.

¶20 At trial, Ernie S. testified that, although the victim was somewhat relieved to learn he was a Spanish speaker, when she first spoke with him she appeared to be "very, very scared" and never calmed down "at any moment" but "was just bad throughout the whole time" they were together. At Appellant's objection, a hearing was held during a jury recess. During the hearing, Ernie S. testified that, when the victim first saw him in the apartment complex, she asked for his help and then stated more than once, "My son *just* raped me." (Emphasis added.) The victim made a few telephone calls asking for someone to come get her, and then immediately asked Ernie S. if he would drive her to her niece's home, which Ernie S. estimated to be "10, 15 minutes" from the apartment complex. Ernie S. testified that, as they walked to his car, the victim was still "very, very scared." He stated that the victim leapt into the back seat and laid down on it until they exited the apartment complex because she was still "very frightened." Further, the victim did not sit up until he had driven "a couple of streets down" from the

apartment complex, and when she did so, "she was just crying hysterically . . . [and] it started to almost worry me because I thought she was going to lose her mind. She was just unbelievably hysterically crying." Finally, when they arrived at her niece's home, the victim implored Ernie S. to walk to the door with her.

¶21 Although no precise time-frame for the assault was established, this testimony belies Appellant's claim that the statements "were uttered hours after the purported rape." The victim's statement that her son had "just" raped her supports the inference that the event occurred shortly before she approached Ernie S. in the apartment complex. Only the victim's brief phone calls to her employer and her niece separated that statement from the drive to her niece's home. Furthermore, Ernie S.'s testimony concerning the victim's demeanor while in transit establishes that she was still in a highly emotional state and under the stress of the attack throughout the brief ride to her niece's home.

¶22 We review a trial court's ruling on the admissibility of evidence for an abuse of discretion. *State v. Aguilar*, 209 Ariz. 40, 49, ¶ 29, 97 P.3d 865, 874 (2004). Given this testimony, we conclude that the trial court did not abuse its discretion in finding that, based on the totality of the circumstances, the victim's statements during the ride in the

car were excited utterances and therefore admissible under that exception to the hearsay rule. *See* Ariz. R. Evid. 803(2).

II. Confrontation Clause/Hospital Interpreter

¶23 Before trial, Appellant made an oral motion *in limine* to preclude the State from introducing the victim's statements to the Scottsdale Health Care nurse regarding Appellant's actions in committing the assaults. Because the victim had gone to Mexico and was not expected to appear for trial, her statements to the nurse provided the only detailed description of the offenses. The trial court held a hearing at which the nurse appeared telephonically. At the conclusion of the hearing, the court held that the statements were non-testimonial because they were rendered for purposes of medical treatment and therefore admissible as an exception to the hearsay rule on that basis. *See* Ariz. R. Evid. 803(4).

¶24 When the nurse began to testify at trial, Appellant objected to admission of the victim's statements on "disclosure" grounds, arguing that the State had failed to timely and fully disclose the identity of the interpreter the nurse used to translate. That objection was properly denied by the court, and Appellant does not renew it on appeal.

¶25 Appellant also made "foundation" and "hearsay" objections, in which he appeared to argue that the interpreter's translation of the victim's statements was not admissible

because the State had not provided information about her abilities and credentials as an interpreter. The trial court found that the interpreter's recitation in English of the victim's statements was not precluded hearsay based on the court's earlier ruling that the victim's statements were made for the purpose of medical treatment and given that the interpreter's words were merely a translation of those statements already deemed admissible under the medical treatment exception to the rule. Instead, the court looked upon Appellant's objection as foundational and determined that foundation had been established because of the nurse's testimony that Scottsdale Health Care, in its normal course of business, used and relied on the particular translation service that employed the interpreter. The court concluded that Appellant's arguments thus went only to the weight, and not the admissibility, of the interpreter's translation.

¶26 At the conclusion of the nurse's trial testimony, the trial court found "additional indicia of reliability" that supported its earlier decision. These included the nurse's testimony that: (1) the particular translation services used were the only translation services used during the five years the nurse was employed by Scottsdale Health Care; (2) nurses were directed to use only that service for translations; and (3)

the nurse had not noticed the interpreter experience any difficulties in translating the victim's statements.

¶27 For the first time on appeal, Appellant argues that admission of the interpreter's translation of the victim's statements violated his Sixth Amendment rights and *Crawford v. Washington*, 541 U.S. 36 (2004), because he was not permitted to cross-examine the interpreter. Appellant acknowledges that he failed to raise this issue before the trial court and thus bears the burden to establish both fundamental error and prejudice. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 20, 115 P.3d 601, 607 (2005). Fundamental error is error that goes to the foundation of a case, error that takes from a defendant a right essential to his defense, and error that is of such magnitude that a defendant could not possibly have received a fair trial. *Id*. at ¶ 19 (citations omitted). In this case, however, Appellant establishes no error, let alone fundamental error, and therefore no prejudice.

¶28 Appellant does not contest the trial court's finding that the victim's statements were admissible under the medical treatment exception to the hearsay rule. *See* Ariz. R. Evid. 803(4). He argues instead that we should construe the *translation* of those statements as "testimonial" because they were used as substantive evidence of the crimes at trial. However, the trial court's finding that the victim's statements

were obtained for medical treatment purposes removes those statements from the realm of testimonial evidence. The interpreter's translation of the victim's words into English does nothing to change that fact.

¶29 Moreover, the interpreter's translation of the victim's statements into English is not *the interpreter's* testimony against Appellant and does not transform *the interpreter* into a witness against him. She simply recited what the victim stated. Therefore, any cross-examination of the interpreter about her *translation* of the victim's words would not be a test of the veracity of the *victim's* accusations. It could only be an exploration of the interpreter's abilities and credentials as a translator, which, as the trial court correctly concluded, affected only the weight to be given her translation of the statements and not the statements' admissibility.

¶30 Rather than *Crawford*-based, Appellant's arguments on appeal really address the foundation for admitting the interpreter's translation, which we find the trial court properly resolved. The testimony that the interpreter was part of a contracted-for translation service used extensively and exclusively by the Scottsdale Health Care system over a number of years and that the nurse neither detected nor was informed of any problems in translating during the medical interview supports the trial court's conclusion that the service employed

qualified interpreters, including the interpreter at issue. *See Aguilar*, 209 Ariz. at 49, ¶ 29, 97 P.3d at 874.

¶31 In any case, Appellant cannot establish prejudice. His arguments that the interpreter may not have been certified or otherwise qualified are pure speculation. Furthermore, his inability to cross-examine her at trial did not deprive him of a right essential to his defense. The trial court permitted Appellant to argue to the jury the weight to be given the interpreter's rendition of the victim's statements. Appellant argued in closing that the jury knew nothing about the hospital's interpreter and that, nonetheless, the State wanted the jury "to believe faithfully without question that everything that was said and interpreted is accurate." He argued that the State had provided the jury with "no clue as to her credentials . . . [or] if she's certified" or even "a last name," and that these omissions created reasonable doubt. Appellant has failed to establish either reversible error or prejudice in this case.

III. Motion to Vacate Judgment

¶32 Before sentencing, Appellant filed a motion to vacate judgment pursuant to Arizona Rule of Criminal Procedure 24.2. The basis for the motion was "newly discovered" evidence that the victim informed the author of the pre-sentence incarceration report "that she was not involved in the present offense," and

she later explained that, "while she was 'attacked' by [Appellant], she was not restrained or forced to do anything."

¶33 The victim appeared at a hearing on October 24, 2008. She testified that she had not realized Appellant's girlfriend was present in the apartment on the night of the attack and, consequently, she "didn't give [Appellant] the chance" to show that he was "confused" as to with whom he sought to engage in sexual activity. She suggested that she had learned of this fact through Appellant's pastor, who apparently had been present throughout the trial. She also maintained that Appellant had never "restrained" her, even if she had left the apartment through a window. She stated that when Appellant approached her, he did not attack her "[r]ight away"; instead, he "laid down." She also repeatedly asked the court "to show a lot of mercy and leniency" on behalf of her son, who was "not a bad person."

¶34 At sentencing, the trial court denied the motion to vacate judgment, stating that the fact Appellant might have confused the victim with his girlfriend was not something new but something that was known and argued at the time of trial, that the victim did not recant and never specifically said "it didn't happen," and that none of the information was unknown to Appellant at the time of trial. On appeal, Appellant claims the

trial court erred in denying his motion to vacate judgment because of the "newly discovered evidence."

¶35 We review for an abuse of discretion a denial of a motion to vacate judgment or for new trial based on newly discovered evidence. *See State v. Serna*, 167 Ariz. 373, 374, 807 P.2d 1109, 1110 (1991). To merit post-conviction relief based on newly discovered evidence, (1) the material presented must show that the evidence relied on is, in fact, newly discovered; (2) the motion must allege facts from which the court can infer due diligence; (3) the evidence must not be merely cumulative or impeaching; (4) the evidence must be material to the issue involved; and (5) it must be evidence that, if introduced at a new trial, would probably change the verdict. *Id*. (citations omitted).

¶36 As the trial court found, nothing that the victim stated was "newly discovered evidence" or unknown to Appellant at the time of trial. The victim's attestation that Appellant might have confused her for his girlfriend is not a denial that the assaults happened and, as the trial court also noted, the victim never said "it didn't happen."

¶37 We generally defer to the trial court's evaluation of testimony and of the effect the purported evidence would have had on the jury's verdicts. *See id*. at 375, 807 P.2d at 1111. We conclude that the trial court did not abuse its discretion in

denying Appellant's motion to vacate based on newly discovered evidence.

CONCLUSION

¶38 For the foregoing reasons, we affirm Appellant's convictions and sentences.

_____/S/_____
LAWRENCE F. WINTHROP, Judge

CONCURRING:

_____/S/_____
MAURICE PORTLEY, Presiding Judge

_____/S/_____
MARGARET H. DOWNIE, Judge