DIVISION ONE
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PHILIP G. URRY, CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 08-1061
	)	
Appellee,	)	DEPARTMENT B
	)	
v.	)	**MEMORANDUM DECISION**
	)	
DIEGO BARRIENTE,	)	(Not for Publication –
	)	Rule 111, Rules of the
Appellant.	)	Arizona Supreme Court)
	)	
	)	

Appeal from the Superior Court in Navajo County

Cause No. S-0900-CR-0020080434

The Honorable Dale P. Nielson, Judge

AFFIRMED

Terry Goddard, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
and Joseph T. Maziarz, Assistant Attorney General
Attorneys for Appellee

David Goldberg — Fort Collins, CO
Attorney for Appellant

B A R K E R, Judge

¶1 Diego Barriente appeals his convictions and sentences for attempted second degree murder and four counts of aggravated

assault, on the grounds that (1) the trial court deprived him of due process by limiting his cross-examination of one of the victims, (2) the trial court violated the rules prohibiting hearsay and his rights under the Confrontation Clause by admitting the 9-1-1 calls, and (3) there was insufficient evidence offered to prove the requisite intent for attempted murder and that he did not act in self-defense. For the reasons that follow, we find no error and affirm.

Facts and Procedural History

¶2 The evidence introduced at trial, viewed in the light most favorable to supporting the conviction,[1] was as follows. At about 9 a.m. on September 29, 2007, appellant and his girlfriend got into an argument over breakfast. Appellant followed his girlfriend into the bedroom, grabbed her and slammed her onto the bed. He squeezed her throat and then put a pillow over her face until she started to black out. She testified that she thought he was going to kill her. When she came to, she grabbed her cell phone, jumped out the window in her pajamas and bare feet, jumped the fence in the front yard, and started walking down the street. While she was speaking to a 9-1-1 operator, appellant pulled up behind her in his pickup truck, told her he

[1] *State v. Moody*, 208 Ariz. 424, 435 n.1, ¶ 2, 94 P.3d 1119, 1130 n.1 (2004).

was sorry, and ordered her to hang up the phone and get in his truck. She refused, and he drove off.

¶3 She called a male friend to come get her, explaining that appellant "had beat me up, and I just wanted to get out of there." "I was crying, and I was scared that he was going to come back." When her friend arrived, she saw appellant turn onto the street and pull up behind her friend's truck. As she reached for the door handle to her friend's truck, appellant accelerated for about five feet and hit the back of her friend's truck, jolting it forward.

¶4 The friend saw appellant open the driver's side door and point what looked like a rifle at him. As the friend sped away, he heard "a pow, a bang like." Police subsequently discovered a bullet hole in the back window of his truck "[a]lmost directly behind the driver" and broken glass behind the seat.

¶5 The friend testified that appellant followed him down the road to a dead end, pulled to a stop in front of his truck, and fired two more shots with a black handgun through his front windshield. One bullet hit near the grill area just below the windshield wipers, and another went through the windshield into the seat beside him. The friend shifted into reverse and drove erratically backwards down the street at a high rate of speed before he was able to turn around and drive forward.

Appellant's girlfriend testified that appellant drove after her friend at a high rate of speed.

¶6 Appellant's girlfriend testified that some hours later, after she had retrieved her belongings and was at her friend's house, appellant called her and said something to the effect that, "you stupid B, don't sit with your back to the window 'cause I can put a bullet in your head." At the time, she was sitting with her back to a window. She also testified that appellant wrote her three months later and asked her to say that her friend shot at him first. The letter suggested "all you have to say is that he had a gun shot at me thew [sic] his back window and then he and then I shot back or just [a]sk to [r]ead my [r]eport and go with it [sic] I think that would be the best thing to do is [r]ead the report."

¶7 Appellant testified at trial that he had not used a pillow to smother his girlfriend, and he had not rammed her friend's truck, but that the other truck had simply rolled back into his. He testified that when he saw the back window of the other truck shatter as he followed it down the road, he thought the other driver had shot at him. He testified that when he pulled up beside the other truck, he saw the driver fooling with a firearm down by his knees. Asked by his attorney why he did not just leave, appellant answered: "I don't know. He's psycho, man. I got my kids running around there. I can't let people

like that run the streets, especially in your neighborhood." He instead twice ordered the driver to leave, and when the other driver kept fooling with the firearm, he shot twice through the front windshield, which "got his attention." "He looks at me and just hauls ass in reverse." Appellant later agreed with his counsel that he felt that if he did not shoot at the other driver, the other driver was going to shoot him.

¶8 Police did not find any weapons in the other truck in a search after this incident. The other driver testified that he did not own a gun and had never fired at appellant.

¶9 Appellant admitted that he abandoned his truck by the side of the road after it broke down, hid his handgun in a tree, and ran from police before finally surrendering.

¶10 The jury convicted appellant of attempted second degree murder and four counts of aggravated assault. The judge sentenced appellant to concurrent terms, the longest of which was a mitigated term of seven years. He timely appealed.

Discussion

1. Limitation on Cross-Examination

¶11 Appellant argues first that the trial court deprived him of due process by limiting his cross-examination of one of the victims on "his recent involvement in a shootout which was relevant to impeach his testimony and corroborate Appellant's testimony that he acted in self-defense." This issue first

arose in the following bench conference before defense counsel started his cross-examination of the other driver:

> MR. ACKERLEY (defense counsel): The prosecutor actually asked [the other driver] if he had had some trouble when he was in his 20's or 30's. Judge, in our opinion, he opened the door to asking [the other driver] questions about his trouble with the law late last year.
>
> THE COURT: No.
>
> MR. ACKERLEY: Is that a no?
>
> THE COURT: That's a no. He was involved in that case, right, in front of the justice court where he got a gun away from a guy that shot him, and then he went to the – is that this?
>
> MR. ACKERLEY: That's correct.
>
> THE COURT: I think that would have to be irrelevant.
>
> MR. ACKERLEY: Okay.

¶12 The issue again arose when the driver testified that he had not had enough experience with guns to tell what caliber of gun appellant had used to shoot at him. Appellant approached the bench, and the following discussion ensued:

> MR. ACKERLEY: I think at this point, denying that he has familiarity of handguns, I think I have the right to impeach him using his involvement in that shootout in Snowflake.
>
> THE COURT: No, I just don't – no. You should have brought that up before. That's another act. I think there would have had to have been a pretrial ruling.

Mr. ACKERLEY: Okay.

THE COURT: I won't allow it.

¶13 The constitutional rights to due process and confrontation guarantee a criminal defendant "a meaningful opportunity to present a complete defense." *Crane v. Kentucky,* 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). The constitutional right to confront witnesses also encompasses a right to cross-examine witnesses concerning their bias or motive. *See Davis v. Alaska*, 415 U.S. 308, 315-16 (1974). These rights, however, are not without limits. "[T]rial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant." *State v. Canez,* 202 Ariz. 133, 153, ¶ 62, 42 P.3d 564, 584 (2002) (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 679 (1986)); see also *United States v. Scheffer,* 523 U.S. 303, 308-09 (1998) ("A defendant's right to present relevant evidence is not unlimited, but rather is subject to reasonable restrictions," including application of reasonable evidentiary rules). We review rulings on the admissibility of evidence for abuse of discretion. *State v. Ellison,* 213 Ariz.

116, 129, ¶ 42, 140 P.3d 899, 912 (2006). We review constitutional issues *de novo*. *See id.*

¶14 We cannot say on this record that the trial court erred in precluding this evidence. The record fails to establish that the testimony appellant sought to elicit from this witness was relevant either for impeachment or to support his claim of self defense. Defense counsel made no proffer as to what precisely had been the nature of the witness's "trouble with the law late last year," or his "involvement in the shootout in Snowflake," and how it was relevant to show his familiarity with types of handguns, or to any other issue at trial. Although the judge appeared to be familiar with the incident, which he confirmed with defense counsel was the incident "in front of the justice court where he got a gun away from the guy that shot him," this court is not. In the absence of any offer of proof on the record establishing more precisely what this incident involved, or how it was relevant to impeach this witness or how it supported appellant's claim of self defense, we cannot say that the trial court abused its discretion in precluding this testimony. *See* Ariz. R. Evid. 103(a)(2) ("Error may not be predicated upon a ruling which . . . excludes evidence unless . . . the substance of the evidence was made known to the court by offer or was apparent from the context."); *State v. Towery*, 186 Ariz. 168, 179, 920

P.2d 290, 301 (1996) ("When an objection to the introduction of evidence has been sustained, an offer of proof showing the evidence's relevance and admissibility is ordinarily required to assert error on appeal."); *State v. Doody*, 187 Ariz. 363, 373, 930 P.2d 440, 450 (App. 1996) ("Doody made no offer of proof as to any additional evidence he wanted to introduce with respect to the circumstances surrounding the Tucson Four confessions, and therefore provides no basis for further review by this Court."). We decline to find reversible error on this basis.[2]

2. Admission of 9-1-1 Calls

¶15 Appellant next argues that the trial court violated the rules prohibiting hearsay and his rights under the Confrontation Clause by admitting the 9-1-1 calls at trial. We review rulings on the admissibility of evidence for abuse of discretion. *Ellison,* 213 Ariz. at 129, ¶ 42, 140 P.3d at 912. We review constitutional issues *de novo*. *See id.*

¶16 Because appellant failed to object at trial to the admission of any of the 9-1-1 calls, however, we review for fundamental error only. *See State v. Henderson,* 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Fundamental error is error that "goes to the foundation of his case, takes away a right

[2] Appellant also argues the trial court abused its discretion by ruling that the evidence was precluded because there was no pretrial ruling on the issue. Because we do not rely on this argument in making our decision, we do not address it.

that is essential to his defense, and is of such magnitude that he could not have received a fair trial." *Id.* at 568, ¶ 24, 115 P.3d at 608. Defendant bears the burden of establishing both that fundamental error occurred and that he was prejudiced thereby. *Id.* at ¶ 22, 115 P.3d at 608.

a. Excited Utterances

¶17 We reject appellant's argument that the 9-1-1 calls consisted of hearsay inadmissible under the excited utterance exception because they "were made after the event had occurred and both witnesses were in a place of safety." A statement falls within the "excited utterance" exception to the preclusion of hearsay if it is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Ariz. R. Evid. 803(2). The exception requires proof of the following elements: "(1) a startling event, (2) a statement made soon after the event to ensure the declarant has no time to fabricate, and (3) a statement which relates to the startling event." *State v. Bass*, 198 Ariz. 571, 577, ¶ 20, 12 P.3d 796, 802 (2000);[3] *see also State v. Parks*, 211 Ariz. 19, 27, ¶ 36, 116 P.3d 631, 639 (App. 2005) ("Arizona courts have consistently found the physical and emotional condition of the declarant at the time of

[3] The declarant also must have personally observed the event about which he or she spoke. *Id.*

the statement to affect spontaneity more than the time between the statement and the event.").

¶18 The record shows that all of the four calls to 9-1-1 were made about the startling event when the declarants were still under the stress of the event and either during the startling event or soon afterward. Appellant's girlfriend testified that she made her first call to 9-1-1 as soon as she reached the road after jumping the fence in front of appellant's house, which she estimated took about two minutes. She reported that her boyfriend had just choked her and put a pillow over her face, and she wanted someone to come to the house so she could retrieve her belongings. She testified that her words on the tape of this 9-1-1 call were not entirely audible because "I was pretty much hysterical at the time." She said she was scared, she was going down the road, and she was crying as she made the call. The statements on this 9-1-1 call meet the requirements to qualify as an excited utterance, as they were made shortly after the startling event, while she was still hysterical, and they related to the startling event.

¶19 Appellant's girlfriend testified that she made her second call to 9-1-1 pleading for help when she saw the shattered rear window on her friend's pickup truck as it passed at high speed in reverse, followed by appellant's truck going forward at high speed, and she surmised that appellant was

shooting at her friend. She testified that at that point: "I was terrified. I thought he was going to kill my friend." She pled for help. The statements on this 9-1-1 call accordingly meet the requirements to qualify as an excited utterance, as they were made while the startling event was occurring, when she was terrified, and they related to the startling event.

¶20 The friend whom appellant fired at testified that he made his first 9-1-1 call while he was still driving away from appellant. At the time, he was upset, scared, angry, and used profanity "because somebody shot at me." He testified he made the second call to 9-1-1 when he reached his workplace, which was two miles away from the scene, he was still upset, although "a little more calmer, but I still used a lot of profanity." The statements on these 9-1-1 calls also qualify as excited utterances, as they were made shortly after the startling event had occurred, while the declarant was still upset. We decline to find error on this ground.

b. Confrontation Rights

¶21 Nor do we agree with appellant's argument that admission of the 9-1-1 calls violated his rights under the Confrontation Clause. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Supreme Court held that the Confrontation Clause of the Sixth Amendment prohibits the admission of "testimonial evidence" from a non-testifying witness in a criminal trial

against a defendant, unless the proponent can show that the person who made the statement is unavailable to testify, and that defendant had a prior opportunity to cross-examine him or her. *Id.* at 68. Confrontation rights are not violated, however, when the declarant testifies at trial and is subject to cross-examination. *See id. at* 59 n.9. The *Crawford* court expressly identified testimonial hearsay from a witness who appears at trial as exempt from the Confrontation Clause: "[W]e reiterate that when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements." *Id.* (*citing California v. Green*, 399 U.S. 149, 162 (1970)). In this case, both victims who made the 9-1-1 calls testified at trial and were available for cross-examination. Thus, even assuming *arguendo* that the 9-1-1 calls were "testimonial,"[4] admission of the victims' 9-1-1 calls did not violate appellant's rights under the Confrontation Clause. *See id*. In short, we find no error, much less fundamental error causing appellant prejudice, in the trial court's admission of the 9-1-1 calls.

[4] Statements made to the police should be considered "nontestimonial" when the circumstances objectively indicate that the primary purpose of the interrogation is to enable police assistance to handle an ongoing emergency, and not "to identify (or provide evidence to convict) the perpetrator." *Davis v. Washington,* 547 U.S. 813, 822, 826 (2006).

3. Sufficiency of the Evidence

¶22 Appellant also argues that the evidence was insufficient to support his convictions because the State failed to prove that he intended to kill the truck driver when he shot through the front windshield, or that he was not acting in self defense.

¶23 In reviewing the sufficiency of evidence, we view the facts in the light most favorable to upholding the jury's verdict and resolve all conflicts in the evidence against defendant. *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983). Evidence is sufficient when it is more than a mere scintilla and is such proof as could convince reasonable persons of defendant's guilt beyond a reasonable doubt. *State v. Tison,* 129 Ariz. 546, 553, 633 P.2d 355, 362 (1981). "To set aside a jury verdict for insufficient evidence it must clearly appear that upon no hypothesis whatever is there sufficient evidence to support the conclusion reached by the jury." *State v. Arredondo*, 155 Ariz. 314, 316, 746 P.2d 484, 486 (1987).

¶24 We find that the State introduced more than sufficient evidence to support the convictions. First, we disagree with appellant's argument that the State failed to prove that he intended to murder the victim when he shot through the front windshield of his truck, because "neither shot was anywhere near [the victim]," as evidenced by the photos, the trajectory of the

bullets revealed in the photos, and the resting place of the bullets. The evidence shows, rather, that one of the bullets to the front windshield lodged in the back of the middle seat only inches from where the victim was sitting. The other bullet entered the upper hood of the truck just below the windshield, more toward the passenger seat. The proximity of the shots to the driver is clearly evidence of appellant's intent to kill the driver. Moreover, appellant himself agreed with his counsel that he shot "at" the other driver, albeit he claimed it was to prevent the other driver from shooting him. On this record, the State offered sufficient evidence to support the necessary *mens rea* for attempted second degree murder.

¶25 Second, we are not persuaded by appellant's argument that the State failed to prove that he had not acted in self defense. The judge instructed the jury pursuant to A.R.S. § 13-405 that a person is justified in using deadly physical force if a reasonable person in the situation would have believed that deadly force was immediately necessary to protect against another's use or attempted use of unlawful deadly physical force. *See* A.R.S. §§ 13-404(A) (2001) and -405 (2001). The judge also instructed the jury that the State had the burden to prove beyond a reasonable doubt that appellant did not act in self defense. *See* A.R.S. § 13-205(A) (Supp. 2007). The other driver testified that he did not own a gun and had not shot at

appellant, but rather, appellant shot at him once through the rear window, then pulled in front of him and shot at him twice more though the front windshield. The broken glass behind the driver's seat supported the other driver's claim that appellant shot at him through the rear window. Credibility determinations are for the fact finder, not this court, and the jury could have rejected appellant's testimony in its entirety. *See State v. Dickens,* 187 Ariz. 1, 21, 926 P.2d 468, 488 (1996). Moreover, even if the jury believed appellant's testimony that he thought the other driver was preparing to shoot him, the jury could have concluded that no reasonable person would believe that deadly force was immediately necessary to protect himself. The jury could have concluded, rather, that a reasonable person would simply have driven away and called police. Appellant admitted that after this incident, he hid his handgun in a tree and ran from police. Appellant's girlfriend also testified that he wrote her asking her to tell police that the other driver shot at him first. On this record, the evidence was more than sufficient to prove beyond a reasonable doubt that appellant was not acting in self defense.

Conclusion

¶26 For the foregoing reasons, we affirm appellant's convictions and sentences.

/s/
_____
DANIEL A. BARKER, Judge

CONCURRING:

/s/
_____
PATRICIA K. NORRIS, Presiding Judge

/s/
_____
PETER B. SWANN, Judge