DIVISION ONE
FILED: 12/28/2010
RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	1 CA-CR 09-0361
	)	
Appellee,	)	DEPARTMENT E
	)	
v.	)	**MEMORANDUM DECISION**
	)	
	)	(Not for Publication –
GRACE PIANKA,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	
	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR 2006-121327-001 DT

The Honorable Warren J. Granville, 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

James J. Hass, Maricopa County Public Defender — Phoenix
by Thomas Baird, Deputy Public Defender
Attorneys for Appellant

W E I S B E R G, Judge

¶1 Grace Pianka appeals her conviction and sentence for second-degree murder. She argues that the trial court violated her rights under the Confrontation Clause of the Sixth Amendment

by admitting portions of a crime-stop call and later 9-1-1 call, and by refusing to give a *Willits*[1] instruction for failure of police to preserve voice mails on the victim's cell phone. For the reasons that follow, we affirm her conviction and sentence.

FACTS AND PROCEDURAL HISTORY

¶2 The evidence at trial, viewed in the light most favorable to upholding the jury's verdict,[2] demonstrated that on the morning of April 15, 2006, Pianka discovered that her husband was seeing another woman. Pianka started drinking tequila after returning home from following her husband and observing him get into the woman's car. After talking with her best friend, who testified that Pianka sounded "very upset," Pianka withdrew about $24,500 from the couple's bank accounts.

¶3 That afternoon, Pianka repeatedly called her husband. Pianka's best friend went to Pianka's house at about 5 p.m. and observed that Pianka was very intoxicated and "could barely walk and she was crying." At about 6:15 p.m., Pianka called a married male co-worker to invite him over for dinner, an invitation he refused.

¶4 Just before 7 p.m., as her best friend was leaving, Pianka's husband returned home. Sometime between 6:45 and 7:20

[1]*State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964).

[2]*State v. Gallegos,* 178 Ariz. 1, 9, 870 P.2d 1197, 1105 1994).

p.m., a neighbor heard a woman shouting followed immediately by what sounded like two or three gun shots. At about 7:15 p.m., another neighbor heard the smoke alarm in Pianka's house go off and went to investigate. The neighbor had to step aside to avoid Pianka hitting him as she backed out of her driveway in a hurry, looking frantic, her face wet with tears. She had her dog with her, but no cell phone and no shoes.

¶5 At about 9:40 p.m., the victim's mistress called crime stop, worried because he had not returned from a trip home to pick up items; she said she did not know the exact address but would drive there and call back.

¶6 Shortly after 10:00 p.m., police investigating a 9-1-1 call from the victim's mistress discovered him dead in his bedroom from four gunshot wounds fired either by a .38 Special or a .357 Magnum handgun. The victim had purchased a .38 Special handgun for Pianka in February 2005; this weapon was never found. Bags of the victim's clothes and his toiletries at the house, and a list of items to take in his pocket, gave the appearance that he was packing up to leave.

¶7 The following morning, a police officer discovered Pianka slumped in her car in Bagdad, unresponsive, with aspirin scattered throughout the front seat. Fearing a suicide attempt, the officer called paramedics, who removed her from the car and

transported her to the hospital.[3] The officer found an empty brass .38 caliber cartridge in her purse, and an envelope containing about $24,600 with the handwritten note that it was "for [Pianka's best friend] and my son, Victor Pianka." Pianka testified at trial that she did not know why she had not addressed the envelope to her husband.

¶8 When police questioned Pianka at the hospital on April 18, 2006, she repeatedly asked if her husband was in the hospital, and if he was ok. When told her husband was dead, she said, "You've got to be kidding me." In a later phone call to her best friend, Pianka referred to her husband's death as an accident.

¶9 Pianka testified that her husband was alive when she left the house, and that she drove aimlessly, feeling hopeless and betrayed, but that she did not shoot her husband or intend to commit suicide.[4] Defense counsel argued that the mistress and/or the mistress's husband had killed the victim.

¶10 The jury convicted Pianka of second-degree murder, and the judge sentenced her to a mitigated term of thirteen years in prison. Pianka filed a timely appeal.

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[3]Pianka testified that she was later told that she had taken about 100 aspirin.

[4]The State offered testimony from Pianka given at the prior trial in its case in chief in this trial. Pianka also testified at this trial in her own defense.

DISCUSSION

Confrontation Rights

¶11 Pianka argues that in the absence of the victim's mistress's appearance as a witness at trial, the trial court violated Pianka's confrontation rights by admitting redacting recordings of the crime-stop call and the 9-1-1 call made by the mistress before and after she discovered the victim's body. Pianka argues that the calls did not address any *bona fide*, ongoing emergency, but rather the first call was made only after the mistress had been unable to reach the victim for twenty-five minutes and thought "there might be a situation," and the second call was made after he had "been dead for an undetermined period of time." Accordingly, Pianka asserts both calls were testimonial.

¶12 The background on this issue is as follows. Before a prior trial, which ended in a mistrial, a different judge ruled that portions of the 9-1-1 call were admissible in the absence of the mistress's testimony because they were cries for help and accordingly non-testimonial under *Davis v. Washington*, 547 U.S. 813 (2006). The judge did not address whether the crime-stop call was testimonial, but ruled that it was inadmissible in the absence of an exception to the hearsay rules.

¶13 At this trial, the court revisited the issue, and concluded that portions of the 9-1-1 call were admissible as the

mistress's then existing state of mind, an exception to the rule precluding hearsay, and were non-testimonial for purposes of the Confrontation Clause. The court also ruled that portions of the crime-stop call were admissible for their non-hearsay use and under the then-existing state of mind and present sense impression exceptions to the rules precluding hearsay, but did not specifically address on the record the confrontation issue. The court subsequently denied Pianka's motion for either reconsideration or a continuance.

¶14 The mistress did not appear as a witness at trial. The trial court admitted redacted portions of her call to police at 9:40 p.m. for a welfare check and her 9-1-1 call at 10:14 p.m. after discovering the body.

¶15 On appeal, Pianka argues that admission of the redacted crime-stop call and 9-1-1 call violated her confrontation rights. We disagree.

¶16 In *Crawford v. Washington*, 541 U.S. 36, 51 (2004), the United States Supreme Court held that the Confrontation Clause prohibited only the admission of "testimonial hearsay" from a witness who did not appear at trial, unless the proponent could show that the author of the statement was unavailable to testify, and that defendant had had a prior opportunity to cross-examine her. *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,* 547 U.S. at 821.

¶17 The Court clarified in *Davis* that statements taken during a police interrogation are non-testimonial for purposes of the Confrontation Clause when they are made "under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Davis*, 547 U.S. at 822. But 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." *Id.* The *Davis* court further clarified, "This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial . . . And of course even when interrogation exists, it is in the final analysis, the declarant's statements, not the interrogator's questions, that the Confrontation Clause requires us to evaluate." *Id.* at 822 n. 1.

¶18 We review a trial court's determination whether the defendant's constitutional right to confront witnesses was violate*d de novo*. *State v. King*, 212 Ariz. 372, 375, ¶ 16, 132 P.3d 311, 314 (App. 2006). We review the facts bearing on the

confrontation issue in the light most favorable to the proponent of the challenged evidence. *Alvarez,* 213 Ariz. at 468, ¶ 3, 143 P.3d at 669.

¶19 "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, 473, ¶ 19, 143 P.3d 668, 672, 674 (App. 2006)(citation omitted) (statement from victim "found staggering in a roadway, bleeding profusely from his head, and slipping in and out of consciousness," was non-testimonial because purpose of police questioning was to meet ongoing emergency, and to provide assistance to the victim); *see also State v. Parks,* 213 Ariz. 412, 413, ¶ 6, 142 P.3d 720, 721 (App. 2006)(holding that statement of witness to fatal shooting was testimonial because totality of circumstances, including absence of exigent safety, security, or medical concerns, indicated that purpose of officer's questions was to obtain information of a possible crime).

¶20 We hold there was no confrontation violation under the circumstances here. In the portions of the crime-stop call admitted at trial, the victim's mistress asked police to check on the victim, explaining that she was his girlfriend and was concerned about his safety because he had not returned from a

trip home "to pick some stuff up," and his wife had a gun.[5] The call appears to be a classic call for help, and neither the call nor its context indicates that the caller thought that her statements might be used in a later prosecution, or that she was sending it for "the purpose of establishing or proving some fact." Under these circumstances, the crime-stop call was not testimonial, but rather was a non-testimonial cry for assistance in handling a perceived emergency. *Cf. State v. Damper*, 223 Ariz. 572, 575-76, ¶ 12, 225 P.3d 1148, 1151-52 (App. 2010) (holding that text message victim sent shortly before her murder informing third party that she and defendant had argued was non-testimonial).

¶21 Nor were the portions of the 9-1-1 call admitted at trial testimonial. In the 9-1-1 call, the mistress reported seeing the victim on the floor of his bedroom through a back window, his head covered in blood. She repeatedly urged the emergency responders to hurry, saying that the victim might still be alive and might be saved if help arrived quickly. At one point she asked the dispatcher if she could "break a window or something" because of her concern that he might still be alive. When the mistress started to say something about what

[5]The trial court allowed Pianka to include statements in the crime-stop call that he had previously redacted, including the caller's statement that "and I know--um—um--she keeps a gun in her, in her nightstand."

had happened in the past, the dispatcher reminded her that she wanted to know only "what's happening now." The dispatcher asked her whether the victim's wife was home, what she looked like, and what type of car she was driving, questions with the evident purpose of determining whether there was another victim or a perpetrator at large, and, if the latter, to help find that person. The mistress's subsequent statement that when she did not get an answer at the front door, she thought Pianka "could be get--loading the gun or something,"[6] also relayed to the dispatcher the potential danger to first responders, and led police to conduct a protective sweep of the home.[7] On this record, we conclude that those portions of the 9-1-1 call admitted were non-testimonial, and their admission did not violate Pianka's confrontation rights. *See State v. Boggs,* 218 Ariz. 325, 337-38, ¶ 57, 185 P.3d 111, 123-24 (2008) (victim's statements as she lay dying outside the restaurant that the robbers were still inside with other employees were non-testimonial and officers' subsequent actions indicated they understood this was an ongoing emergency).

[6]The mistress subsequently told the dispatcher that she thought that the victim's wife was out walking the dog, because the dog did not bark when she went to the backyard.

[7]This statement in the 9-1-1 call was among those that the judge had previously redacted, but added at Pianka's request. The judge also allowed Pianka to re-insert, "I think you know what, I think she might be in there."

***Willits* Instruction**

¶22 Pianka also argues that the trial court abused its discretion and caused reversible error when it denied her request for a *Willits* instruction based on the State's failure to preserve voice mails left on the victim's cell phone, specifically a 42-second voice mail message that the victim's mistress left on the victim's phone two seconds before she called 9-1-1.

¶23 The background on this issue is as follows. In asking for the *Willits* instruction, Pianka alleged that any messages from the mistress "would have been important for the defense." Specifically, she argued that the voice mail left on the victim's phone by the mistress seconds before her 9-1-1 call could have shown her "emotional state . . . her demeanor, and if she was hysterical from seeing the [the victim] through the window," and might have indicated where she was at the time. The trial court denied the instruction, reasoning that "it [did] not find bad faith in the police failure to discern evidentiary value of the content of voice mails. The trial also found that, "the content is speculative whether it would exculpate or tend to exculpate Pianka," and concluded that there is no "fact or legal basis for giving the Willits instruction for the failure to preserve or collect the substance of the voice mails that are made reference to in Exhibit 333."

¶24 A *Willits* instruction allows the jury to draw an inference from the State's destruction of material evidence that the lost or destroyed evidence would be unfavorable to the State. *State v. Fulminante,* 193 Ariz. 485, 503, ¶ 62, 975 P.2d 75, 93 (1999). A defendant is entitled to a *Willits* instruction upon proving that (1) the State failed to preserve accessible, material evidence that "might tend to exonerate him" and (2) there was resulting prejudice. *Id.* The exonerating potential of the evidence must have been apparent before the State lost or destroyed it. *State v. Davis*, 205 Ariz. 174, 180, ¶ 37, 68 P.3d 127, 133 (App. 2002). "Whether either showing has been made (*i.e.* the showing that the state failed to procure evidence it should have procured and the showing that the defendant was actually prejudiced thereby) is a question for the trial court," and its refusal to give a *Willits* instruction "will not be reversed absent a clear abuse of discretion." *State v. Perez,* 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984).

¶25 There was no abuse of discretion here.[8] Because the exonerating potential of any voice mail to the victim's cell

[8]We do not consider the trial court's reference to the absence of bad faith in the loss of this evidence to be an application of the incorrect legal standard for a *Willits* instruction, as Pianka urges. We view the judge's comment as simply a reference to the bad faith required to find a due process violation for loss of potentially useful evidence. *See State v. Youngblood*, 173 Ariz. 502, 506-07, 844 P.2d 1152, 1156–57 (1993). The court's determination that the exonerating

phone shortly before he died would not have been apparent before the State lost the opportunity to retrieve voice mails, the trial court did not err in failing to give the instruction. *See Davis*, 205 Ariz. at 180, ¶¶ 37-39, 68 P.3d at 133. The *exonerating* potential of the specific voice mail Pianka urges on appeal is not obvious even now, relying as it does on speculation that the voice mail might reveal some inconsistency with the mistress's version of events in the 9-1-1 call.

¶26 The gravamen of Pianka's argument instead appears to be that the police should have conducted a more thorough investigation, and had the foresight to retrieve and save the voice mails on the victim's phone, Pianka's phone, and the home phone shortly after impounding them because the voice mails might have been relevant and helpful to her defense. A defendant, however, is not entitled to *a Willits* instruction "merely because a more exhaustive investigation could have been made." *State v. Murray,* 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). "Indeed, in almost every case prosecuted, the claim can be made that the investigation could have been better." *State v. Willcoxson,* 156 Ariz. 343, 346, 751 P.2d 1385, 1388 (App. 1987). Even in the

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potential of the voice mails was purely speculative, and accordingly did not warrant the *Willits* instruction is supporteby the record. *See Perez*, 141 Ariz. at 464, 687 P.2d at 1219. ("We are obliged to affirm the trial court's ruling if the result was legally correct for any reason.")

absence of the *Willits* instruction, moreover, Pianka was able to argue that the jury could infer that the missing voice mail might have revealed the inconsistencies in the mistress's conduct. On this record, there was neither an abuse of discretion nor reversible error in the trial court's refusal to give a *Willits* instruction.

CONCLUSION

¶27 For the foregoing reasons, we affirm Pianka's conviction and sentence.

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SHELDON H. WEISBERG, Judge

CONCURRING:

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PHILIP HALL, Presiding Judge

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PETER B. SWANN, Judge