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UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

STATE OF ARIZONA, *Appellee*,

v.

NATHAN ANDREW SHAFFER, *Appellant*.

No. 1 CA-CR 16-0161
FILED 6-15-2017

Appeal from the Superior Court in Maricopa County
No. CR2014-128595-001
The Honorable John Christian Rea, Judge

AFFIRMED

COUNSEL

Arizona Attorney General's Office, Phoenix
By Alice Jones
Counsel for Appellee

Maricopa County Public Defender's Office, Phoenix
By Carlos Daniel Carrion
Counsel for Appellant

MEMORANDUM DECISION

Presiding Judge Samuel A. Thumma delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Judge James P. Beene joined.

T H U M M A, Judge:

¶1 Nathan Adam Shaffer appeals his convictions and sentences after a jury found him guilty of two counts of aggravated assault, Class 3 felonies and domestic violence and dangerous offenses. Because Shaffer has shown no error in the admission of a recording of a brief 9-1-1 call by one of the victims, his convictions and resulting sentences are affirmed.

FACTS AND PROCEDURAL HISTORY

¶2 In June 2014, Shaffer was involved in a domestic violence dispute with his wife T.S.¹ During the dispute, Shaffer pointed a gun at T.S., then turned the gun on T.S.'s mother R.B. R.B. called 9-1-1 and, during that call, the following exchange took place:

[R.B.]: I wanna know the address.

DISPATCH: 911, what is your emergency?

[R.B.]: We have a uh, uh, my [] daughter's husband is very [irate] and he's threatening us with a gun.

DISPATCH: Right now?

[R.B.]: And he's yelling at us.

DISPATCH: He has the gun in his hand? Hello, ma'am?

[R.B.]: [] uh, no, he just put the gun down, actually. And I don't know the address 'cause I just came to visit and —

¹ Initials are used to protect the privacy of the victims. *State v. Maldonado*, 206 Ariz. 339, 341 n.1 (Ct. App. 2003).

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DISPATCH: You []

[R.B.] --got in this freaking mess.

¶3 When R.B. could not be located to testify at trial, Shaffer moved in limine to preclude evidence of this 9-1-1 call, relying on his Sixth Amendment Confrontation Clause rights. Shaffer argued R.B.'s statements were testimonial, because they were made "to a law enforcement officer who is in the process of establishing or proving past events relevant to a later criminal prosecution," making "it absolutely reasonable for [R.B.] to have expected the statements would be used in criminal prosecution." After hearing argument, the superior court denied Shaffer's motion in limine. The court first concluded the 9-1-1 call was admissible under the excited utterance exception to the rule against hearsay, a ruling Shaffer does not challenge. *See* Ariz. R. Evid. 803(2)(2017).² The court also found R.B.'s statements were not testimonial under the Confrontation Clause, adding evidence that is admissible under the excited utterance exception to the rule against hearsay "also makes it not testimonial."

¶4 At trial, R.B. did not testify, the 9-1-1 recording was received in evidence and Shaffer was found guilty as charged. The court sentenced Shaffer to five-year concurrent prison terms, with 217 days of presentence incarceration credit. This court has jurisdiction over Shaffer's timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031 and 13-4033(A).

DISCUSSION

¶5 Shaffer argues admission of the 9-1-1 call violated his rights under the Confrontation Clause, which provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI; *see also Crawford v. Washington*, 541 U.S. 36, 68-69 (2004). Given that R.B. did not testify at trial, the dispositive issue is whether her statements in the 9-1-1 call were "testimonial" under the Confrontation Clause. *See State v. King*, 212 Ariz. 372, 378 ¶ 28 (Ct. App. 2006) ("9-1-1 calls must be analyzed on a case-by-case basis to determine whether the statements made during the call qualify as testimonial."). This court reviews that issue de novo. *State v. Joseph*, 230 Ariz. 296, 298 ¶ 7 (2012).

² Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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¶6 The fact that the 9-1-1 call was admissible as an excited utterance exception to the rule against hearsay is not dispositive. “[T]he mere fact that statements may be considered excited utterances does not automatically remove them from Confrontation Clause analysis.” *King*, 212 Ariz. at 377 ¶ 22. Instead, “[w]hether an excited utterance will be testimonial . . . depends on the circumstances existing when the statement was made.” *State v. Parks*, 211 Ariz. 19, 27 ¶ 40 (Ct. App. 2005).

¶7 Shaffer is correct in arguing that a 9-1-1 call may, at times, include testimonial statements for purpose of the Confrontation Clause. See *Davis v. Washington*, 547 U.S. 813, 827 (2006). That said, “at least the initial interrogation conducted in connection with a 911 call is ordinarily not designed primarily to ‘establis[h] or prov[e]’ some past fact, but to describe current circumstances requiring police assistance,” which is non-testimonial. *Id.* at 827. A statement may be deemed “testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Id.* at 822. The relevant inquiry is whether the “primary purpose” of the interrogation is to “focus[] the participants on . . . ending a threatening situation” (meaning statements are non-testimonial) or to “prov[e] past events potentially relevant to later criminal prosecution” (meaning they are testimonial). *Michigan v. Bryant*, 562 U.S. 344, 361 (2011).

¶8 Applying this analysis shows R.B.’s statements in the 9-1-1 call recording were not testimonial. R.B.’s statements occurred within the first 30 seconds or so of the call. The transcript shows R.B. made the call while the assault was taking place, not after it was completed. Indeed, when asked “what is your emergency,” R.B. responded that her daughter’s husband (Shaffer) “is very irate and he’s threatening us with a gun.” R.B. was providing a play-by-play description of what was happening at the time to seek aid for an on-going emergency, not discussing “past events potentially relevant to later criminal prosecution.” *Bryant*, 562 U.S. at 361. Because the event was taking place at the time R.B. was speaking to the 9-1-1 operator, Shaffer’s argument that the assault had ended by that time lacks merit.

¶9 Nor has Shaffer shown that the “reasonable expectation” of R.B. was that the call “would be available for use at a later trial” or for the subsequent “investigation or prosecution of a crime.” *King*, 212 Ariz. at 376 ¶ 19, 377 ¶ 21. Instead, the transcript shows that R.B.’s call was “made in the context of immediate danger either from physical injury or threat of injury or harm.” *King*, 212 Ariz. at 378 ¶ 29.

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¶10 “9-1-1 calls that are primarily ‘loud cries for help’ are nontestimonial.” *Id.* Here, the call shows R.B. was seeking assistance given a crisis that was ongoing and that her purpose in making the call was to get help to try to end that crisis. “In general, if the purpose of the call is to seek assistance regarding an ongoing or threatened emergency, the call qualifies as a ‘loud cry for help.’” *Id.* (citations omitted). That is just what happened here. Accordingly, the record does not show that R.B. “would reasonably expect [her] statements to be used prosecutorially” or “that the 9-1-1 operator [was] primarily gathering evidence for an investigation and prosecution.” *Id.* Accordingly, Shaffer has shown no violation of his Confrontation Clause rights.

CONCLUSION

¶11 Shaffer’s convictions and resulting sentences are affirmed.



AMY M. WOOD • Clerk of the Court
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