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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE



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FILED: 06-24-010  
PHILIP G. URRY, CLERK  
BY: GH

STATE OF ARIZONA, ) 1 CA-CR 09-0374  
 ) 1 CA-CR 09-0386  
 Appellee, ) 1 CA-CR 09-0388  
 ) (Consolidated)  
 v. )  
 ) DEPARTMENT E  
 BRANDON SCOTT TERRY, )  
 ) **MEMORANDUM DECISION**  
 Appellant. ) (Not for Publication -  
 ) Rule 111, Rules of the  
 ) Arizona Supreme Court)  
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Appeal from the Superior Court in Maricopa County

Cause Nos. CR2008-158657-001 DT,  
CR2007-139138-001 DT; CR2008-111971-001 DT

Commissioner Steven P. Lynch, Judge Pro Tempore

**AFFIRMED**

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Terry Goddard, Attorney General Phoenix  
By Kent E. Cattani, Chief Counsel  
Criminal Appeals/Capital Litigation Section  
and Michael J. Mitchell, Assistant Attorney General  
Attorneys for Appellee

Law Office of Corso & Rhude Peoria  
By John M. Rhude  
Attorney for Appellant

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J O H N S E N, Judge

¶1 Brandon Scott Terry appeals his conviction of aggravated assault and the resulting revocation of probation. For the reasons that follow, we affirm.

**FACTUAL AND PROCEDURAL BACKGROUND**

¶2 "We construe the evidence in the light most favorable to sustaining the verdict, and resolve all reasonable inferences against the defendant." *State v. Greene*, 192 Ariz. 431, 436, ¶ 12, 967 P.2d 106, 111 (1998) (citation omitted). Terry does not contest the sufficiency of the evidence to support his conviction. Therefore, it will suffice to note that after an argument with the victim, Terry approached her with two knives as she sat in her car, repeatedly stabbed the car and slashed one tire. As he did so, Terry threatened to kill the victim.

¶3 After a two-day trial, Terry was convicted of aggravated assault. Because of his conviction, his terms of probation on two prior convictions were revoked. Terry was sentenced to the minimum term of 11.25 years' imprisonment for aggravated assault and presumptive terms of one year imprisonment for the two prior convictions. All sentences were ordered to be served concurrently.

¶4 Terry filed a timely appeal. We have jurisdiction pursuant to Article 6, Section 9 of the Arizona Constitution and

Arizona Revised Statutes ("A.R.S.") sections 12-120.21(A)(2003), 13-4031 (2010) and 13-4033 (2010).

## **DISCUSSION**

### **A. Alleged Coaching of Witnesses.**

¶15 Terry first asserts the superior court erred when it failed to admonish the victim after she allegedly coached witnesses on the stand by nodding and/or shaking her head from where she sat in the gallery of the courtroom. Terry further contends the court should have investigated "the coaching's effect on witness testimony or the jury."

¶16 The issue arose at the beginning of the final day of the two-day trial. Defense counsel informed the court that the day before, the victim appeared to be coaching witnesses by nodding and/or shaking her head during the witnesses' testimony. Defense counsel conceded she did not observe any of this activity herself, but was informed of it by Terry's girlfriend. Defense counsel asked that if the victim appeared at trial again, the court admonish her "to keep some of her motions or gestures to herself." Defense counsel did not ask the court to conduct any sort of investigation or take any further action.

¶17 The court noted it had observed the victim during the other witnesses' testimony the day before and that it had "the best vantage point." The court stated that while the victim occasionally nodded her head during the testimony of other

witnesses, the victim was not "demonstrative" and had done nothing that merited the court's admonition. There is nothing in the record to indicate the victim appeared for the second and final day of trial.

¶18 We will not overturn a decision regarding the conduct of trial absent an abuse of the superior court's discretion. *State v. Just*, 138 Ariz. 534, 550, 675 P.2d 1353, 1369 (App. 1983). In reviewing an exercise of discretion, "[t]he question is not whether the judges of this court would have made an original like ruling, but whether a judicial mind, in view of the law and circumstances, could have made the ruling without exceeding the bounds of reason. We cannot substitute our discretion for that of the trial judge." *Associated Indem. Corp. v. Warner*, 143 Ariz. 567, 571, 694 P.2d 1181, 1185 (1985) (quoting *Davis v. Davis*, 78 Ariz. 174, 179, 277 P.2d 261, 265 (1954) (Windes, J., specially concurring)).

¶19 We have no reason to conclude the superior court abused its discretion in this instance. First, the court personally observed the victim and found she was not being "demonstrative" and had done nothing to warrant an admonition. There is nothing in the record to suggest this was not a reasonable finding. Second, Terry only asked the court to admonish the victim if she appeared again at trial. As noted above, there is nothing in the record to indicate the victim

ever reappeared at trial. Therefore, even if the court should have admonished the victim about "coaching" of witnesses, there was no need to do so. Further, nothing in the record suggests the court abused its discretion in failing to undertake an investigation into the matter. As noted, the court had already determined, based on its own observations, that no coaching had occurred.

¶10 For these reasons, the superior court did not abuse its discretion in responding to the assertion that the victim had "coached" witnesses during the prior day's testimony.

**B. Asserted Admission of Hearsay.**

¶11 Terry also contends the superior court erred when it admitted statements his girlfriend made to a 9-1-1 operator during a prior incident between Terry and the victim. The girlfriend testified on direct examination regarding the prior incident and her call to 9-1-1. On cross-examination, the girlfriend denied she told the 9-1-1 operator she had actually slept through most of the prior incident. She further testified she called 9-1-1 because she was afraid of what the victim might do and denied she told the 9-1-1 operator she called because she was afraid of what Terry might do because of his temper. Finally, while the girlfriend initially denied she told the 9-1-

1 operator Terry's temper "gets bad," she later admitted she told this to the operator.<sup>1</sup>

¶12 Terry argued his girlfriend's statements to the 9-1-1 operator were inadmissible hearsay and that admission of those statements denied him the right to confrontation because the 9-1-1 operator was not available for cross-examination. The court held the statements were admissible as prior inconsistent statements to impeach the girlfriend's earlier testimony. We review a superior court's evidentiary rulings for a clear abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990).

¶13 The court did not err in admitting the testimony. The girlfriend's statements to the 9-1-1 operator were, by definition, not hearsay. A prior inconsistent statement is not hearsay if it is made by a witness who is subject to cross-examination about that statement. Ariz. R. Evid. 801(d)(1)(A); *State v. Sucharew*, 205 Ariz. 16, 23, ¶ 20, 66 P.3d 59, 66 (App. 2003). Further, a witness may be impeached with his or her prior inconsistent statements. *State v. Thompson*, 167 Ariz. 230, 231, 805 P.2d 1051, 1052 (App. 1990). The girlfriend's statements to the 9-1-1 operator were inconsistent with her

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<sup>1</sup> The girlfriend was never shown a transcript of her 9-1-1 call, and extrinsic evidence of her statements was not admitted into evidence. See Ariz. R. Evid. 613. The State merely asked the girlfriend questions regarding whether she made certain statements to the 9-1-1 operator.

testimony regarding her ability to observe the prior incident, why she called 9-1-1 and her denial she told the 9-1-1 operator Terry's temper "gets bad." Her statements therefore were admissible as prior inconsistent statements for impeachment purposes and did not constitute hearsay.

¶14 The Confrontation Clause provides that "in all criminal prosecutions an accused has the right to be 'confronted with the witnesses against him.'" *State v. Moore*, 203 Ariz. 515, 517, ¶ 7, 56 P.3d 1099, 1101 (App. 2002) (citation omitted, emphasis added). Terry was confronted with all the witnesses who provided testimony or other evidence against him. The 9-1-1 operator was not a witness against Terry, so the operator's alleged unavailability for trial was irrelevant.

¶15 The trial court did not abuse its discretion when it allowed the State to impeach the girlfriend with her prior inconsistent statements, and Terry was not denied the right to confront any witness.

**CONCLUSION**

¶16 We affirm Terry's conviction, the revocations of probation and the sentences imposed.

/s/  
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DIANE M. JOHNSEN, Presiding Judge

CONCURRING:

/s/  
\_\_\_\_\_  
PHILIP HALL, Judge

/s/  
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PATRICIA K. NORRIS, Judge