DIVISION ONE
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RUTH WILLINGHAM, ACTING CLERK
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IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. JAMES EARL SMITH, JR., Appellant.	)	1 CA-CR 09-0680 DEPARTMENT D **MEMORANDUM DECISION** (Not for Publication – Rule 111, Rules of the Arizona Supreme Court)

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-138720-002 SE

The Honorable Emmet J. Ronan, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
By Kent E. Cattani, Chief Counsel
Criminal Appeals/Capital Litigation Section
And Sarah E. Heckathorne, Assistant Attorney General
Attorneys for Appellee

James J. Hass, Maricopa County Public Defender — Phoenix
By Louise Stark, Deputy Public Defender
Attorneys for Appellant

O R O Z C O, Judge

¶1 James Earl Smith, Jr. (Smith) appeals his convictions and sentences for two counts of attempted first degree murder, two counts of aggravated assault, and one count of armed robbery. He argues on appeal that the court fundamentally erred in admitting hearsay from persons who did not appear as witnesses at trial. For the reasons that follow, we find no error and affirm.

FACTS AND PROCEDURAL HISTORY

¶2 Evidence at trial[1] showed that Smith asked his girlfriend's nephew to drive him to an apartment complex where Smith previously resided. On the first trip to the complex, Smith picked up clothing. The nephew testified that during the second trip, Smith's cell phone died and Smith borrowed his cell phone to give someone directions to the complex. When Smith and the nephew arrived at the apartment complex for the second time, Smith went into an alley way. When he returned, he was accompanied by one black and two Hispanic males. All four got into the nephew's car with Smith in the front passenger seat and the other three in the back seat. During this time Smith continued with his call on the nephew's cell phone and told the party on the other line to "bring the stuff." It soon became

[1] We view the evidence in the light most favorable to upholding the jury's verdict. *State v. Moody*, 208 Ariz. 424, 435 n.1, ¶ 2, 94 P.3d 1119, 1130 n.1 (2004).

apparent to the nephew that Smith was arranging a drug purchase. Smith concluded the call, reached over and turned off the ignition of the nephew's car, took the keys out of the steering column and put them in the front seat console. Smith told the nephew to "stay put" and he and the three men in the back seat left the nephew's car and returned to the alley. A few minutes later a Toyota Avalon with two Hispanic males pulled up next to the nephew's car in the parking lot of the complex.

¶3 After Smith lured the driver out of the Toyota by showing him a roll of cash, both Hispanic males came out from the alley. One accomplice was armed with a shotgun, and the other was armed with a small silver handgun that Smith had previously shown the nephew. The accomplice with the shotgun knocked the driver down to the ground with the butt of the shotgun, and continued to hit him with the shotgun while he was on the ground. The accomplice demanded the driver produce the drugs. When the driver removed a baggie of what appeared to the nephew to be cocaine the size of a small brick from his pocket, Smith ordered the accomplice armed with the handgun to retrieve it. After retrieving the drugs, the accomplice fired a shot in the direction of the victim.

¶4 When the accomplice refused Smith's order to "finish him off," Smith grabbed the handgun from the other accomplice, "walked up and said, this is how you do it, and [] shot it three

times toward the [the driver's] head." The victim was shot in the head and a bullet also went through his hand. As a result of the shooting, the driver was hospitalized for several weeks, and it took several months for him to regain his ability to talk and walk.

¶5 In the meantime, the accomplice with the shotgun went to the passenger side of the Toyota and struck the passenger through the Toyota's window with the butt of the shotgun, then pulled the passenger from the car and hit him again. Smith ordered this accomplice to shoot the passenger, but the accomplice said he was out of shotgun shells. Smith walked over to the passenger, pressed the handgun to his head and pulled the trigger, but the gun did not fire.

¶6 Smith then got in the victim's Toyota and drove away. The two Hispanic accomplices got in the backseat of the nephew's car and he drove back to his aunt's house. At the aunt's house the two accomplices joined Smith in the victim's Toyota and the three drove away.

¶7 Smith later returned to his girlfriend's house, put his handgun on the floor and did a "little dance." He also made a disparaging comment about what "we" had done to the victims.

¶8 Police subsequently found the stereo stolen from the victim's Toyota in Smith's girlfriend's bedroom. Smith admitted to police that he had recently been staying at his girlfriend's

house, and he used to live at the apartment complex where the shooting took place. Smith, however, denied being at the apartment complex the day of the shooting.

¶9 Both victims returned to their homes in Mexico after this incident and did not appear at trial. Smith's girlfriend could not be found prior to trial and did not appear as a witness. The only eye witness to testify at trial was the nephew of Smith's girlfriend. The nephew testified at trial pursuant to a plea agreement wherein he plead guilty to the charge of facilitation to commit armed robbery. Two charges of attempted murder and two charges of aggravated assault against the nephew arising from the same incident were dismissed.

¶10 The jury convicted Smith of two counts of attempted first degree murder, two counts of aggravated assault and one count of armed robbery. Smith admitted that the offenses were committed for pecuniary gain as an aggravating factor.

¶11 The trial court sentenced Smith to an aggravated term of fifteen years on the charge of attempted first degree murder as to the first victim, and to a term of ten and one-half years for the attempted first degree murder of the second victim; both sentences were to be served consecutively, and he was sentenced to lesser terms on the other convictions. Smith timely appealed. We have jurisdiction pursuant to Article 6, Section

9, of the Arizona Constitution, and Arizona Revised Statutes (A.R.S) section 12-120.21 (2003).

DISCUSSION

¶12 On appeal, Smith argues that "unreliable and inadmissible hearsay was substantively used to persuade the jurors that witnesses other than [the girlfriend's nephew] described a black male, [Smith], as the gunman," thereby violating his confrontation rights. Specifically, Smith describes the following testimony as containing inadmissible hearsay, in violation of his Confrontation Clause rights: 1) testimony from police that as many as ten witnesses at the apartment complex had stated that the shooter was a black male; 2) testimony from an officer that the investigation revealed that the nephew, a Hispanic male, was in the vehicle at the time of the shooting; 3) an officer's testimony that no witnesses reported seeing a female at the scene of the shooting; 4) officers' testimony that both victims gave them statements, and one of the victims told hospital personnel what had happened; and 5) testimony from an officer that he told Smith in a post-arrest interrogation that witnesses saw him at the crime scene.

¶13 We review a trial court's ruling on the admissibility of evidence under exceptions to the hearsay rules for abuse of discretion, and its determination whether the defendant's constitutional right to confront witnesses was violated *de novo*.

State v. King, 212 Ariz. 372, 375, ¶ 16, 132 P.3d 311, 314 (App. 2006). An abuse of discretion occurs in an evidentiary ruling when the decision is clearly untenable, legally incorrect, or amounts to a denial of justice. *State v. Arellano*, 213 Ariz. 474, 478, ¶ 14, 143 P.3d 1015, 1019 (2006). Because Smith failed to object to the testimony at issue on any grounds at trial, we review for fundamental error only. *See State v. Henderson*, 210 Ariz. 561, 567, ¶ 19, 115 P.3d 601, 607 (2005). Smith accordingly bears the burden of establishing that the trial court erred, that the error was fundamental, and that the error caused him prejudice. *Id.* at 568, ¶ 22, 115 P.3d at 608. Under the Arizona Rules of Evidence, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Ariz. R. Evid. 801(c). The Confrontation Clause prohibits only the admission of testimonial hearsay from a witness who does not appear at trial. *See Crawford v. Washington*, 541 U.S. 36, 59 n.9 (2004). A statement to police is considered non-testimonial when it describes current circumstances requiring emergency assistance and is not "designed primarily to 'establis[h] or prov[e]' some past fact." *Davis v. Washington*, 547 U.S. 813, 827 (2006).

¶15 Smith fails to meet his burden to establish fundamental, prejudicial error. He argues first that the rule

prohibiting hearsay and, consequently, his confrontation rights, were violated when "police repeatedly testified that unnamed officers talked to as many as ten unnamed witnesses at the apartment complex, who consistently said that a black male was present and pulled the trigger." Smith argues that this testimony improperly bolstered the nephew's testimony that Smith, a black man, was the shooter.

¶16 For this argument, Smith cites: (1) testimony from the case agent that police interviewed "approximately eight" or more residents of the apartment complex "about things they may have seen or not seen;" (2) his later testimony that the investigation had initially revealed that the shooter was a black male; and (3) finally, his testimony that he knew that he was looking for a black male from the more than ten interviews that officers had conducted at the scene. Although one could certainly infer from the case agent's testimony that the unidentified witnesses had told police that a black male was the shooter, the case agent did not testify what precisely the witnesses had told him, or expressly offer their out-of-court statements to prove the truth of the matter asserted. The testimony thus did not constitute hearsay, much less testimonial hearsay, and thus did not violate either the hearsay rules or Smith's confrontation rights. *See* Ariz. R. Evid. 801(c); *Crawford,* 541 U.S. at 59 n.9 (noting that the Confrontation

Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted"); *State v. Smith*, 215 Ariz. 221, 229, ¶ 26, 159 P.3d 531, 539 (2007). The testimony instead narrowly addressed in limited fashion why the police investigation proceeded as it did from the start. Furthermore, the testimony was elicited, in part, in response to Smith's repeated cross-examination of police as to why they did not test for gunshot residue the night of the shooting. Officers stopped the car driven by the nephew, a Hispanic male, believing him to be a suspect because his cell phone had been used to call the victim around the time of the shooting. In response to questioning about why police had not tested Smith's girlfriend or the nephew for gunshot residue, the officer stated that based on information received from their investigation, they were looking for a black male suspect. We decline to find that the trial court fundamentally erred in failing to strike the cited testimony on hearsay grounds or on confrontation grounds. Moreover, Smith has failed to persuade us that absent this testimony, a reasonable jury could have acquitted him, as is his burden on fundamental error review. *See Henderson*, *2*10 Ariz. at 568-69, ¶¶ 26-27, 115 P.3d at 608-09. On this record, we find that Smith has not met his burden to show fundamental, prejudicial error in the admission of the cited testimony.

¶17 Nor do we find any merit in Smith's claim that the trial court similarly erred in admitting testimony indicating that the nephew was in the car at the time of the shooting, and testimony that witnesses had not reported any women present at the scene of the shooting. When a party "open[s] the door" to later, otherwise objectionable testimony, there is no error. *State v. Garcia*, 133 Ariz. 522, 526, 652 P.2d 1045, 1049 (1982). When error is invited by opening the door, however, "the evidence or response must be 'pertinent'; that is, it must be specifically responsive to the invitation." *State v. Wilson*, 185 Ariz. 254, 259, 914 P.2d 1346, 1351 (App. 1996).

¶18 Smith opened the door to testimony on whether the investigation had revealed that the nephew was in the car at the time of the shooting by asking another officer to confirm that a search warrant affidavit he prepared a week after the shooting stated that the nephew had transported "the subject . . . knowing they were going to rob or shoot the victim," and the nephew was considered a suspect in the shooting. By asking these questions, Smith opened the door to the state's redirect examination on whether this officer had included any statement in the affidavit avowing that the nephew was the shooter. The officer responded that he had not, and he was not aware of what evidence the other officers might have as to whether the nephew "would have or could have been the shooter." He also testified,

"I simply put in the affidavit the information I was given at that time regarding the vehicle, his presence in it, the firearm being found in it, the firearm in the vehicle, et cetera." The prosecutor's elicitation of the complained-of testimony was in direct response to defense counsel's invitation, and accordingly was not error, much less fundamental, prejudicial error.

¶19 Smith also opened the door to the prosecutor's questioning of the case agent as to whether any of the investigative witnesses stated that a Hispanic female was present during the shooting. Smith opened the door by asking the case agent whether it was possible that Smith's girlfriend rather than Smith had called the victims immediately before the shooting, and asking him why police did not test her for gunshot residue when she was taken into custody the night of the crime. In this instance as well, the prosecutor's elicitation of the complained-of testimony was in direct response to defense counsel's invitation, and accordingly was not error, much less fundamental, prejudicial error.

¶20 Nor do we find any merit in Smith's claim that the trial court violated hearsay rules and his confrontation rights by admitting police testimony that "both victims gave them statements," and one of the victims "was able to tell hospital staff what happened to him." In none of the testimony cited in support of this argument did the officers relay to the jury any

of the statements made by the victims to police or hospital personnel. Smith's claim that the trial court admitted this testimony in violation of the hearsay rules and his confrontation rights accordingly fails.

¶21 Finally, we find no merit in Smith's argument that the trial court violated the hearsay rules and his confrontation rights when the detective informed Smith that "witnesses . . . had come in and said things about [Defendant] being at the crime scene." The detective's statement to Smith was admitted not for the truth of the matter asserted, but rather to provide context to Smith's response, which was that "he was not a well-liked person on the basketball court, so he figured that these people didn't – they were throwing out his name because they didn't like him." *See State v. Boggs,* 218 Ariz. 325, 334, ¶¶ 34-35, 185 P.3d 111, 120 (2008) (holding that because the questions "were admissible at least for the limited purpose of showing the context of the interrogation," defendant could not demonstrate fundamental error).

CONCLUSION

¶22 For the foregoing reasons, we affirm Smith's convictions and sentences.

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PATRICIA A. OROZCO, Judge

CONCURRING:

/S/
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PATRICIA K. NORRIS, Presiding Judge

/S/
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JOHN C. GEMMILL, Judge