DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: DLL

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA,	)	No. 1 CA-CR 10-0657
	)	
Appellee,	)	DEPARTMENT C
	)	
v.	)	**MEMORANDUM DECISION**
	)	(Not for Publication -
CLARK ANDREW FISH,	)	Rule 111, Rules of the
	)	Arizona Supreme Court)
Appellant.	)	

Appeal from the Superior Court in Maricopa County

Cause No. CR2008-106570-001 DT

The Honorable Janet E. Barton, Judge

AFFIRMED

Thomas C. Horne, Attorney General — Phoenix
by Kent E. Cattani, Chief Counsel,
Criminal Appeals/Capital Litigation Division
and Jeffrey L. Sparks, Assistant Attorney General
Attorneys for Appellee

Bruce F. Peterson, Maricopa County Legal Advocate — Phoenix
by Consuelo M. Ohanesian, Deputy Legal Advocate
Attorneys for Appellant

H A L L, Judge

¶1 Clark Andrew Fish appeals his convictions and sentences for kidnapping, a class two dangerous felony and

domestic violence offense, and first-degree murder, a class one dangerous felony and domestic violence offense.

FACTS AND PROCEDURAL HISTORY

¶2 A grand jury indicted Fish on one count of kidnapping for knowingly restraining the victim with the intent to inflict death, physical injury, or a sexual offense on the victim, or to otherwise aid in the commission of a felony. The grand jury also charged Fish with felony murder, for kidnapping or attempting to kidnap the victim, and in the course of and in furtherance of such offense, causing her death; or, alternatively, with premeditated murder, for intentionally or knowingly causing the death of the victim with premeditation. The State filed a notice of intent to seek the death penalty.

¶3 The evidence at trial, viewed in the light most favorable to upholding the jury's verdict,[1] was as follows. On October 5, 2007, police found the thirty-two-year-old victim dead, lying face down on the living-room floor of the apartment that Fish shared with her. Fish told the officer that the victim had just been fired from her job, that she had previously attempted suicide, and that she had "made some comments about wanting to end it" the night before. He told the officer that the victim had drunk the equivalent of about four bottles of

[1] *State v. Girdler,* 138 Ariz. 482, 488, 675 P.2d 1301, 1307 (1983).

wine the night before. A toxicologist testified that the victim had a blood alcohol concentration of .17 when she died.

¶4 Fish told the officer that he had drunk about eighteen beers that night. He said that he and the victim had argued that night, and several times he had physically removed her from the bedroom in which he was sleeping. He said that he moved to the living room later that night, and he woke in the morning to find her lying dead beside him.

¶5 The victim's brother testified that the victim told him about two months before her death that Fish was beating her, and showed him dark bruises on her upper arms, shoulders, back, and neck. The victim's brother confronted Fish, and Fish admitted beating her and choking her. Fish called the victim's brother later, told him he "was beating the living shit out of" the victim, and threatened to kill her if her brother did not come over to the apartment. The victim's brother heard the victim screaming in the background.

¶6 The victim's coworkers testified that after she started dating Fish, they had observed a black eye, bruises on her arms, bruises on her legs, and bruising on both sides of her neck. One of her coworkers testified that she saw bruises on both sides of the victim's neck on two different occasions, the last time three days before she died.

¶7 The medical examiner testified that, in her opinion, the death was a homicide, caused by manual strangulation. She testified that consistent pressure obstructing the arteries in the neck would cause the victim to lose consciousness within thirty seconds, but death could take up to five minutes to occur.

¶8 The jury convicted Fish of kidnapping, a class two dangerous felony and domestic violence offense, and first-degree murder, a class one dangerous felony. Two jurors found only felony murder, and ten jurors found both premeditated and felony murder. The jury reached an impasse in the penalty phase, and the judge declared a mistrial. The parties stipulated to a natural-life sentence on the murder conviction, and the judge sentenced him accordingly. The judge sentenced Fish to ten and one-half years on the kidnapping conviction, to be served concurrently with the natural-life sentence on the murder conviction.

DISCUSSION

I. Sufficiency of Evidence/Merger Doctrine

¶9 Fish argues that the trial court abused its discretion in denying his motion for judgment of acquittal on the felony-murder charge because no evidence demonstrated that he had committed the predicate offense of kidnapping as distinct from the murder. He argues that the evidence showed only that he

held the victim as he strangled her, and under the common law doctrine of merger, the kidnapping merged into the homicide and accordingly could not support the felony-murder charge.

¶10 In reviewing the sufficiency of the evidence, we resolve all conflicts in the evidence against defendant. *Girdler,* 138 Ariz. at 488, 675 P.2d at 1307. The credibility of witnesses and the weight given to their testimony are issues for the jury, not the trial judge. *See State v. Just,* 138 Ariz. 534, 545, 675 P.2d 1353, 1364 (App. 1983). No distinction exists between circumstantial and direct evidence. *State v. Stuard*, 176 Ariz. 589, 603, 863 P.2d 881, 895 (1993). "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). We review the sufficiency of the evidence de novo. *State v. Bible*, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993). We review a ruling on a motion for judgment of acquittal that relies on statutory interpretation de novo as well. *State v. Latham*, 223 Ariz. 70, 72, ¶ 9, 219 P.3d 280, 282 (App. 2009).

¶11 At the close of the State's case, Fish moved for dismissal or judgment of acquittal on the felony-murder charge pursuant to the merger doctrine outlined in *State v. Essman*, 98 Ariz. 228, 403 P.2d 540 (1965), and its progeny, on the ground

that the evidence failed to show any restraint beyond the strangulation that resulted in the victim's murder. The State argued that a fresh injury on the victim's arm evidenced a restraint distinct from the strangulation; none of the cases relied upon by Fish found that kidnapping merged with felony murder; the governing statute provides that kidnapping may be a predicate offense for felony murder; and kidnapping is not a lesser-included offense of murder. The trial judge believed that the evidence showed that "it just seems to be one event, which is the murder, and not a kidnapping," but deferred ruling until after she had read the case law on the merger doctrine submitted by Fish. The following day, she ruled:

> The first issue I think we needed to address was your Rule 20 motion. And I will tell you I have done some research on that I have taken into consideration, and I am going to deny your motion to dismiss the felony murder count. I believe that the elements for felony murder are different than the elements for kidnapping, neither is a lesser included offense of the other. A felony murder conviction can be based upon the predicate offense of kidnapping, but because kidnapping is accomplished before the death or can be accomplished before the death, there is no merger. Kidnapping requires confinement or restraint while murder does not. Murder requires a death, but kidnapping does not.
>
> So, I don't believe that we run afoul of the merger doctrine in this case, and it's for that reason that I'm going to deny the Rule 20 motion to dismiss the felony murder count.
>
> * * *
>
> I believe that substantial evidence has been shown, and I did not really need to research that issue.

> What I took and felt that I took under advisement was the merger doctrine.

¶12 We conclude that the evidence in this case was sufficient to support the felony-murder conviction. A person commits kidnapping under Arizona Revised Statutes (A.R.S.) section 13-1304(A)(3) (2010) by, in pertinent part "knowingly restraining another person with the intent to . . . [i]nflict death, physical injury or a sexual offense on the victim, or to otherwise aid in commission of a felony."[2] Kidnapping is an offense that continues as long as the victim is restrained. *See State v. Jones*, 185 Ariz. 403, 406-07, 916 P.2d 1119, 1122-23 (App. 1995). "Restrain" means to "restrict a person's movements without consent, without legal authority, and in a manner which interferes substantially with such person's liberty, by either moving such person from one place to another or by confining such person." A.R.S. § 13-1301(2) (2010). Restraint is without consent if it is accomplished by physical force or intimidation. A.R.S. § 13-1301(2)(a).

¶13 A person commits the offense of felony murder in pertinent part if "the person commits or attempts to commit . . . kidnapping under § 13-1304 . . . and, in the course of and in furtherance of the offense . . . the person . . . causes the

[2] We cite to the current version of the applicable statutes because any amendments since the date of the offenses do not affect the sections at issue.

death of any person." A.R.S. § 13-1105(A)(2) (2010). "A death is 'in furtherance' when it results from any action taken to facilitate the accomplishment of the [predicate] felony." *State v. Lacy*, 187 Ariz. 340, 350, 929 P.2d 1288, 1298 (1996) (internal quotation omitted). "This is ordinarily a question to be determined by the trier of fact, and reversible error occurs only when there is a complete absence of probative facts to support the conviction." *Id.* (internal punctuation and citations omitted).

¶14 The jury could have reasonably inferred from the medical examiner's testimony that Fish restrained the victim by pressing his arm or his hands around her neck for thirty seconds before she lost consciousness, during which time she presumably struggled to get free, and he continued to press his arm or his hands against her neck for several minutes until she died. This evidence was sufficient for a reasonable jury to conclude that Fish had significantly restricted the victim's movement by holding her without her consent with the intent to inflict injury or death or to sexually assault her, thereby committing the offense of kidnapping. The evidence was also sufficient for a reasonable jury to find that "in the course of and in furtherance of" this kidnapping, Fish caused the victim's death, and accordingly, committed the offense of felony murder. *See Lacy*, 187 Ariz. at 350, 929 P.2d at 1298.

¶15 Our conclusion that the act of kidnapping was distinct from the act of homicide necessarily disposes of Fish's claim that the merger rule set forth in *Essman* precludes his conviction for felony murder. The defendant in *Essman* was convicted of felony murder when his wife was killed by a single gunshot. 98 Ariz. at 230, 403 P.2d at 541. Reversing the conviction, the supreme court stated "[t]he felony-murder doctrine does not apply where the felony is an offense included in the charge of homicide." *Id*. at 235, 403 P.2d at 545. The underlying felony in *Essman* was assault with a deadly weapon; the court held that "[t]he acts of assault merge into the resultant homicide, and may not be deemed a separate and independent offense which could support a conviction for felony murder." *Id*. Unlike assault, kidnapping is specified as a predicate felony. Moreover, kidnapping is not a lesser-included offense of murder. *See State v. Lopez*, 174 Ariz. 131, 142-43, 847 P.2d 1078, 1089-90 (1992) (rejecting claim that the merger doctrine announced in *Essman* precluded defendant's conviction for felony murder based on the predicate offense of child abuse); *see also State v. Williams*, 111 Ariz. 222, 225, 526 P.2d 1244, 1247 (1974) (rejecting argument that kidnapping merged into rape, reasoning in part that the essence of kidnapping was

holding the victim with intent to rape her). *Essman* has no application to the facts of this case.[3]

II. Victim's Statements on 9-1-1 Call

¶16 Fish also argues that the trial court abused its discretion when it admitted the victim's statements heard in the background of a 9-1-1 call Fish made to get help for the victim, who was threatening suicide, because the victim's statements were inadmissible hearsay and violated the Confrontation Clause.

¶17 Before trial, Fish sought to preclude the State from introducing the victim's statements in the background of the 9-1-1 call he made on August 12, 2007, about two months before her death. He argued in pertinent part that the victim's yelled statements that he had "choked her" and "tried to strangle" her, and "I have bruises everywhere," were hearsay statements inadmissible as either present sense impressions or excited utterances, and were testimonial, and accordingly their admission would violate his confrontation rights. The judge ruled the 9-1-1 call was admissible, and also admitted a transcript of the call as an exhibit. She reasoned as follows:

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[3] We note that several cases have called into question the *Essman* approach. *See id.* at 141, 847 P.2d at 1088; *State v. Moore*, 222 Ariz. 1, 213 P.3d 150 (2009); *State v. Dann*, 205 Ariz. 557, 74 P.2d 231 (2003); *State v. Salazar*, 173 Ariz. 399, 844 P.2d 566 (1992); *State v. Hankins*, 141 Ariz. 217, 687 P.2d 740 (1984); *State v. Miniefield*, 110 Ariz. 599, 522 P.2d 25 (1974). Based on our determination that *Essman* is inapplicable, we need not consider whether the merger rule retains any vitality in Arizona.

> The statements by defendant are admissions of a party opponent. The statements by the victim are present sense impressions and/or excited utterances. In addition, because the statements were made in the context of an ongoing emergency, they are not testimonial and do not violate *Crawford*. *Davis v. Washington*, 547 U.S. at 822.

¶18 During the 9-1-1 call made by Fish to seek help for the victim, who he said was threatening suicide, the victim can be heard in the background yelling:

- He's beating the shit out of
- He's beating the crap out of me.
- Ow[]. I'm just (unintelligible) because he's trying to choke the shit out of me.
- They've been here three times because of you. And I don't think that's (unintelligible).
- (unintelligible) – Ow[].
- Please come and arrest him. He's (unintelligible). Please.
- You shut up. He choked me. You mother fucker.
- (unintelligible) choked the shit out of me.
- Yeah, because you're fucking physically abusive. This is it.
- Well he tried to – (unintelligible) tell them you tried to choke me within an inch of my life and then knocked me out. Ow. (Unintelligible) all of me.
- There's marks on my neck. They'll see it when they come. They'll see it when they come.

- (Unintelligible) he tried to strangle me. He threw me against the wall (unintelligible) You need to go to jail I'm pressing charges against you. (unintelligible) I'm getting evicted (unintelligible).

- You tried to strangle the shit out of me and banged me into the wall. And now you're trying to make it look like I'm the I'm the [sic] fucked up one and now I'm going to get evicted.

- Because you tried to strangle me.

- I have bruises on my neck because of you . . . I have bruises everywhere because of you. I'll strip down naked in front of the fucking cops so they can see. And you'll be the one going to fucking jail, not me.

A. Hearsay Objection

¶19 Fish first argues that the judge erred in admitting the victim's statements at trial over his hearsay objections, as excited utterances and/or present sense impressions, because the evidence failed to show that the events that the victim was describing were occurring at that time or had just occurred, or that the victim was still under the stress of excitement caused by the events.

¶20 We review evidentiary rulings for abuse of discretion. *State v. Andriano*, 215 Ariz. 497, 502, ¶ 17, 161 P.3d 540, 545 (2007). We find no such abuse on this record.

¶21 Hearsay is "a statement, other than one made by the declarant while testifying . . . offered in evidence to prove the truth of the matter asserted," and is generally inadmissible

at trial. Ariz. R. Evid. 801(c), 802. Otherwise inadmissible hearsay may be admitted as a present sense impression if it consists of a statement "describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." Ariz. R. Evid. 803(1). "The theory behind the exception is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation." *State v. Tucker*, 205 Ariz. 157, 165, ¶ 42, 68 P.3d 110, 118 (2003) (internal quotation omitted).

¶22 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." *See State v. Bass*, 198 Ariz. 571, 577, ¶ 20, 123 P.3d 796, 802 (2000).

¶23 On appeal, Fish does not argue that the victim did not perceive the events and conditions that she was describing, as necessary for the present sense impression exception, or that the victim was not describing startling events, as necessary for

the excited utterance exception. Instead, he argues only that "there is no indication that [the victim] was still dominated by the emotions, excitement, fear or pain of the events she related in her statements," as necessary for the excited utterance exception, and "there is no indication of when the purported events [the victim] was describing occurred," to support the present sense impression exception.

¶24 We find the 9-1-1 tape itself provides ample support for the judge's implicit finding that the beating and choking that the victim was describing had occurred sufficiently recently to be admissible under the present sense impression exception. The first few comments the victim makes on the 9-1-1 call are phrased in the present tense, reflecting that the beating and the choking are occurring at the time she is talking. Fish himself explains to the 9-1-1 operator that "[s]he thinks I'm beating her but I'm trying to restrain her," further indicating that the physical altercation is ongoing during the 9-1-1 call. The victim's remarks in the first half of the 9-1-1 call are also interspersed with the exclamation, "ow," further indicating that the events that she is describing are occurring at that moment. When the operator asks Fish why the victim keeps saying "ow," he responds, "she keeps trying to grab the phone from me and I'm just pushing her away," an additional indication that the physical fight is ongoing. In

context, the judge could conclude that the victim's repeated statements throughout the remainder of the call that Fish "choked" her, was "physically abusive," "tried to strangle" her, and "threw [her] against the wall" referred to events that had occurred immediately before and at the beginning of the 9-1-1 call. For example, when the victim complains that Fish "tried to strangle" her and "threw [her] against the wall," Fish responds, "[b]ecause you threatened to kill yourself," and explained "[t]hat's why I'm calling the police," indicating this incident had occurred immediately prior to the 9-1-1 call.

¶25 On this record, the trial court did not abuse its discretion in finding that the victim described events while she perceived the events or immediately thereafter, as necessary to qualify her statements as present sense impressions. *See* Ariz. R. Evid. 803(1) (exception covers statements "made while the declarant was perceiving the event or condition, or immediately thereafter"); *Tucker*, 205 Ariz. at 166, ¶ 46, 68 P.3d at 119 (noting that "[t]rial courts have some latitude in finding whether a statement was made immediately after the event").

¶26 There is also ample support in the tape itself for the judge's implicit finding that the victim also made these statements while "she was under the stress of excitement caused by the event," as necessary to qualify the statements as excited utterances. The content of the remarks, as outlined *supra*,

support a conclusion that the startling events that the victim is describing occurred immediately before the 9-1-1 call and are continuing throughout. Moreover, "Arizona courts have consistently found the physical and emotional condition of the declarant at the time of the statement to affect spontaneity more than the time between the statement and the event." *State v. Parks*, 211 Ariz. 19, 27, ¶ 36, 116 P.3d 631, 639 (App. 2005). One need only listen to the victim's voice on the tape to conclude that she was still under the stress of excitement caused by the beatings that she describes: it appears that she is sobbing in the background, she repeatedly exclaims "ow," and she sounds distraught, if not hysterical, when she yells the statements at issue. On this record, we cannot say that the trial court abused its discretion in admitting the statements under the excited utterance exception. *See id*.

B. Confrontation Objection

¶27 Fish also argues that the trial court violated his confrontation rights in admitting the victim's statements. We review a trial court's 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).

¶28 In *Crawford v. Washington*, 541 U.S. 36, 51 (2004), the Supreme Court held that the Confrontation Clause prohibited 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 him. *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 v. Washington*, 547 U.S. 813, 821 (2006).

¶29 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." *Davis*, 547 U.S. at 822. A statement to police, however, is considered non-testimonial when "the circumstances objectively indicat[e] that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." *Id.* at 822. "To determine whether the 'primary purpose' of an interrogation is 'to enable police assistance to meet an ongoing emergency,' which would render the resulting statements nontestimonial," courts "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." *Michigan v. Bryant*, 131 S.Ct. 1143, 1156 (2011) (quoting *Davis*,

547 U.S. at 822). "[T]he relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purposes that reasonable participants would have had, as ascertained from the individuals' statements and actions and the circumstances in which the encounter occurred." *Id*. The existence of an "ongoing emergency" at the time "is among the most important circumstances informing the 'primary purpose' of an interrogation." *Id.* at 1157.

¶30 We find that the statements at issue in this case were not testimonial as contemplated by *Crawford* and its progeny because, to the extent that the victim directed her remarks to the 9-1-1 dispatcher rather than Fish, the primary purpose was to make sure the police understood the nature of the ongoing emergency at the apartment so they could appropriately intervene. The record clearly shows the existence of an ongoing emergency: Fish explains to the 9-1-1 dispatcher that he called because the victim was threatening to kill herself; the victim can be heard in the background denying that she tried to kill herself and yelling that Fish is beating and choking her. Whether one accepts Fish's reason for making the 9-1-1 call or the victim's explanation of what was going on, clearly police intervention was sought to resolve an ongoing emergency. Under the circumstances, we find that the primary purpose of the victim's statements to the 9-1-1 dispatcher was to ensure that

the police understood that she had not threatened suicide, but that Fish was physically attacking her, had attempted to strangle her, and had thrown her against a wall. Moreover, many of the victim's statements were specifically directed to Fish, and not to the 9-1-1 operator, suggesting that she was not attempting "to establish or prove past events potentially relevant to later criminal prosecution," but rather was engaging in a screaming verbal battle with Fish in an attempt to force him to tell the 9-1-1 operator what really was going on. *See Davis*, 547 U.S. at 822. Under these circumstances, we find that the victim's remarks were non-testimonial, and the trial court did not err in admitting them over Fish's confrontation objection. *See id.* at 827-28 (holding non-testimonial 9-1-1 caller's statements, "he's here jumpin' on me again," and "he's usin' his fists").

CONCLUSION

¶31 For the foregoing reasons, we affirm Fish's convictions and sentences.

/s/
PHILIP HALL, Judge

CONCURRING:

/s/
MICHAEL J. BROWN, Presiding Judge

/s/
PATRICIA K. NORRIS, Judge