IN THE
# ARIZONA COURT OF APPEALS
DIVISION TWO

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THE STATE OF ARIZONA,
*Appellee*,

*v.*

JAVIER RIVERA CABRERA,
*Appellant*.

No. 2 CA-CR 2019-0128
Filed January 15, 2021

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Appeal from the Superior Court in Pima County
No. CR20173511002
The Honorable Kimberly H. Ortiz, Judge Pro Tempore

**AFFIRMED**

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COUNSEL

Mark Brnovich, Arizona Attorney General
Linley Wilson, Deputy Solicitor General/Section Chief of Criminal Appeals
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*Counsel for Appellee*

Emily Danies, Tucson
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**OPINION**

Vice Chief Judge Staring authored the opinion of the Court, in which Presiding Judge Espinosa and Judge Eckerstrom concurred.

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S T A R I N G, Vice Chief Judge:

**¶1** Javier Cabrera appeals his convictions and sentences for theft of a means of transportation and third-degree burglary. For the following reasons, we affirm.

**Factual and Procedural Background**

**¶2** We view the facts in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Cabrera. *See State v. Murray*, 247 Ariz. 583, ¶ 2 (App. 2019). In July 2017, Cabrera entered the service area of a car dealership, and drove away in a customer's truck. Dealership employees reported the theft, and Arizona Department of Public Safety troopers located the truck on the freeway. A trooper followed Cabrera as he exited the freeway and stopped at a gas station, and the trooper parked his patrol car behind the truck and activated his lights.

**¶3** The trooper got out of his car and pointed his gun at the truck. A detective arrived "within a minute" with a K-9 unit, announced his presence, and warned Cabrera that if he attempted to flee the K-9 would be deployed. Cabrera then complied with orders to get out of the truck with his hands in the air. Cabrera was taken into custody and placed in the back of a patrol car, and the detective informed him the truck he had been driving had been stolen. Cabrera allegedly made a statement denying knowledge of criminal activity, claiming he had taken the truck for detailing.

**¶4** At trial, the detective testified about his involvement in Cabrera's case. On cross-examination, the following exchange occurred:

> Q Now during your encounters with him, Mr. Cabrera made what you considered an excited utterance?
>
> A That's correct.
>
> Q And without saying what he said, I want to just get some background here. After taking him into custody, you told him the car was stolen, correct?
>
> A Correct.
>
> Q And he had a response to that . . . .

**¶5** At that point, the state objected to the introduction of Cabrera's statement through the detective's testimony, arguing Cabrera was attempting to elicit self-serving hearsay. The trial court sustained the objection. During a subsequent bench conference, Cabrera explained he had been "intending to ask [the detective] about an excited utterance that was made where [Cabrera said] that he was just detailing the car . . . immediately after the detective alerted him that the car was stolen." Supporting his argument, Cabrera noted the detective had characterized the statement as an excited utterance in his report. The state maintained the statement was inadmissible as self-serving hearsay, and the court ultimately declined to allow the detective to testify as to Cabrera's statement.

**¶6** The next day, the trial court revisited the issue, stating "the excited utterance exception is for somebody who is under the immediate stress of . . . a very traumatic event, a car crash, [or] an accident . . . ." Further, it noted that there is "inherent reliability in someone blurting out information. They don't have time to think about something." The court continued:

> If it is proven when the car is taken from the lot, and it's a continuing offense with the theft . . . [the] record here doesn't show that there was an immediate event that would make that type of statement reliable. That there's enough time for someone to think about whatever they want to say, unlike the situation that . . . excited utterance is intended to encompass.

**¶7** Cabrera was convicted as described above and sentenced to concurrent terms of imprisonment, the longer of which is 11.25 years. This appeal followed. We have jurisdiction pursuant to article VI, § 9 of the Arizona Constitution and A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

## Discussion

**¶8** Cabrera contends the trial court erred in not admitting his statement to the detective denying knowledge of criminal activity as an excited utterance. "A trial court's ruling on whether a particular statement

was . . . an excited utterance will not be reversed absent a clear abuse of discretion."[1] *State v. Adamson*, 136 Ariz. 250, 255 (1983).

**¶9** Hearsay, although generally inadmissible pursuant to Rule 802, Ariz. R. Evid., is admissible as an "excited utterance" under Rule 803(2), Ariz. R. Evid., if it "relat[es] to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Thus, in order for Rule 803(2) to apply, there must be: "(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." *State v. Bass*, 198 Ariz. 571, ¶ 20 (2000). "The exception is premised on the assumption that the excitement of certain startling events stills the reflective faculties. A spontaneous utterance occurring at the time of or under the stress of the 'startling event' is therefore thought to be reliable . . . ." *State v. Rivera*, 139 Ariz. 409, 411 (1984). And, "[t]he spontaneity of a statement is determined from the totality of the circumstances," including "the length of time between the event and statement, the physical and emotional condition of the declarant, and the nature of the offense." *State v. Beasley*, 205 Ariz. 334, ¶ 30 (App. 2003).

**¶10** Cabrera first claims a startling event occurred when he was pulled over by multiple police cars, including a K-9 unit, and "officers with their guns drawn issued a number of orders" to him. Second, he maintains "the words in question were spoken mere moments after he was pulled over, and immediately after he was apprehended and informed that he was driving a stolen vehicle." Third, he asserts his statement was "in direct response to the arresting officer's remark about the vehicle being stolen, and thus directly related to the startling event of him being dramatically pulled over and immediately arrested." Therefore, Cabrera argues, the trial court erred in ruling his statement was not an excited utterance. Moreover, he contends he was prejudiced as a result of the court's ruling because he "was not afforded the benefit of the 'inherent trustworthiness'" of his statement, specifically, the effect such an "exculpatory statement would have had on the jury's deliberations and the determination of his guilt or innocence."

[1]Cabrera does not identify the proper standard of review in his opening brief. We remind counsel that appellate briefs submitted to this court must include the applicable standard of review for each claim, supported by citations to authority. *See* Ariz. R. Crim. P. 31.10(a)(7)(B).

**¶11** The state counters that the trial court properly sustained its objection because the detective's testimony as to Cabrera's statement was self-serving hearsay not subject to the excited-utterance exception under Rule 803(2). Quoting *Idaho v. Wright*, 497 U.S. 805, 820 (1990), the state contends that being confronted with a crime is not a "startling event" under this rule because it "does not involve a circumstance that eliminates 'the possibility of fabrication,'" and, citing *United States v. Esparza*, 291 F.3d 1052, 1055 (8th Cir. 2002), and *United States v. Elem*, 845 F.2d 170, 174 (8th Cir. 1988), asserts that "a person accused of a crime . . . has a motivation to deny the crime from the very start." Next, it argues Cabrera's statement "was so remote in time from the [alleged] startling event that he had the opportunity to reflect and fabricate [it]." Finally, the state asserts the statement "related to the previous underlying events at the dealership, not the statement by the officer that the vehicle was stolen."

**¶12** Cabrera did not argue below that his arrest was the startling event preceding his statement. Instead, he argued the detective's "accusation," which occurred after he had been taken into custody, constituted the startling event. *See generally State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008) ("objection on one ground does not preserve the issue on another ground" for review on appeal). In any event, based on the information before it, the trial court did not err in concluding that an event sufficiently startling to ensure the reliability of Cabrera's exculpatory out-of-court statement had not occurred.[2] *See Rivera*, 139 Ariz. at 411. "Courts generally do not question the sufficiency of an event to startle once they are convinced the event produced the proper effect on the witness." *Bass*, 198 Ariz. 571, ¶ 25. However, Cabrera fails to point to evidence in the record establishing he was excited or startled at the time of his arrest or when he made the subsequent statement to the detective. *See State v. Flores*, 160 Ariz. 235, 238 (App. 1989) (no error in failing to admit defendant's statement as excited utterance where evidence did not show he "was excited or startled when confronted by police").

**¶13** To the extent Cabrera argues his statement was admissible based on the detective's characterization of the statement as an excited utterance, we disagree. The detective's belief that Cabrera's statement was

[2]Cabrera's statement was not inadmissible based solely on the fact that he was the declarant and the statement was self-serving. *See State v. Conn*, 137 Ariz. 152, 154-55 (App. 1982) (defendant's statements at time of arrest, alleged to be "excited utterances" within exception to hearsay rule, were not inadmissible based solely on self-serving nature).

an excited utterance and his description of the statement as such in his report are not determinative of its legal admissibility, and neither bind the trial court nor this court. Moreover, other than this characterization, there is no evidence that Cabrera was excited or startled when confronted by police officers.[3] Thus, the trial court did not abuse its discretion in concluding Cabrera's statement was not an excited utterance.[4] *See Adamson*, 136 Ariz. at 255; *State v. Perez*, 141 Ariz. 459, 464 (1984) (trial court's ruling affirmed if "legally correct for any reason").

**¶14** Cabrera also argues the trial court's ruling denied him his constitutional right to present a complete defense because "[h]aving an unbiased witness testify about the statement [was] important for [his] defense." We review evidentiary rulings that implicate a defendant's constitutional rights de novo. *See State v. Ellison*, 213 Ariz. 116, ¶ 42 (2006). Because Cabrera did not raise this argument below, he has forfeited review for all but fundamental, prejudicial error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19 (2005).

**¶15** Although the constitution guarantees a criminal defendant "a meaningful opportunity to present a complete defense," *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)), a defendant's right to present evidence is subject to restriction by reasonable evidentiary rules, *see United States v. Scheffer*, 523 U.S. 303, 307-08 (1998); *State v. Prasertphong*, 210 Ariz. 496, ¶ 26 (2005). As discussed above, the trial court did not err in ruling Cabrera's statement did not fall within the excited-utterance exception to the rule against hearsay. Moreover, as the state notes, "the fact that the court sustained the State's hearsay objection did not prevent Cabrera from testifying in his own words about

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[3]Our review is limited to the record before us on appeal. *See State v. Schackart*, 190 Ariz. 238, 247 (1997).

[4] As to Cabrera's argument that he made the statement within "moments" of being pulled over and "immediately" after his arrest, the parties disagree, and the record is unclear, as to the length of time between Cabrera's statement and these events. However, because the trial court could properly find that a startling event did not occur, and, in any event, Cabrera does not point to evidence showing his excited state at the relevant time, we need not address this argument. Similarly, we need not address Cabrera's argument that his statement was related to his arrest. *See Bass*, 198 Ariz. 571, ¶ 20 (each element required for admissibility of statement as excited utterance).

his version of [the] events." Indeed, Cabrera did so testify, claiming his brother had arranged for him to detail the truck and he had taken it from the dealership for that purpose. Thus, Cabrera fails to show he was improperly deprived of a meaningful opportunity to present a complete defense.

## Disposition

**¶16** For the foregoing reasons, we affirm Cabrera's convictions and sentences.