NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

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JUL 18 2013
COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee,	2 CA-CR 2011-0389 DEPARTMENT B
v.	<u>MEMORANDUM DECISION</u> Not for Publication Rule 111, Rules of the Supreme Court
ANDRE T. LIGHTSEY-COPELAND, Appellant.	

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR20093238001

Honorable Teresa Godoy, Judge Pro Tempore

AFFIRMED IN PART; VACATED IN PART

Thomas C. Horne, Arizona Attorney General
By Joseph T. Maziarz and Jonathan Bass — Tucson
Attorneys for Appellee

Lori J. Lefferts, Pima County Public Defender
By Kristine Maish — Tucson
Attorneys for Appellant

E S P I N O S A, Judge.

¶1 Andre Lightsey-Copeland was charged with first-degree murder, and a jury convicted him of the lesser offense of second-degree murder. The trial court sentenced him to a mitigated sentence of twelve years' imprisonment and ordered him to pay restitution. On appeal, Lightsey-Copeland argues the trial court erred in failing to instruct the jury regarding both his right to be present throughout his trial and on third-party culpability. He also challenges the trial court's evidentiary ruling precluding his use of bystander comments immediately following the shooting. For the following reasons, we affirm the conviction and sentence but vacate the criminal restitution order (CRO) entered at sentencing.

Factual and Procedural Background

¶2 "On appeal, we view the facts in the light most favorable to upholding the verdict and resolve all inferences against the defendant." *State v. Klokic*, 219 Ariz. 241, n.1, 196 P.3d 844, 845 n.1 (App. 2008). On July 29, 2009, Chrisean Charles had a dispute with David Tyne at a strip club. Tyne believed Charles had been "disrespectful" of either him or of Tyne's girlfriend, who was a dancer at the club.

¶3 The next day, Charles drove to the club with his girlfriend Jennifer, also a dancer at the club, and learned that Tyne had him followed home. Charles became "uneasy" and "scared," and concerned for Jennifer's safety and that of the couple's young daughter. Charles picked up his cousin, Lightsey-Copeland, and returned to the club. Charles weighed over 400 pounds and is six feet, four inches tall; Lightsey-Copeland weighed about 150 pounds and is approximately five feet, five inches tall.

¶4 Outside the club's entrance, Tyne approached the two men and asked one or both if they "had a problem." Minutes later seven shots were fired and Tyne lay wounded on the ground. Witnesses reported seeing a thin black man with his arm extended and raised, and a gun in his hand, who then fled on foot. They also saw a tall, heavyset black man run to a white car and speed off. Police arrived at the scene within minutes. Tyne later died as a result of several gunshot wounds.

¶5 Lightsey-Copeland was charged with one count of first-degree murder and was convicted and sentenced as outlined above. We have jurisdiction over his appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Jury Instructions

¶6 Lightsey-Copeland asserts that his constitutional rights to a fair trial and due process were violated when the trial court refused to instruct the jury regarding his right to be present at his trial, and also by failing to instruct the jury *sua sponte* regarding third-party culpability. We review a trial court's denial of requested jury instructions for abuse of discretion. *State v. Moody*, 208 Ariz. 424, ¶ 197, 94 P.3d 1119, 1162 (2004). We will not reverse a conviction unless the defendant suffered prejudice as a result of that ruling. *State v. Snodgrass*, 121 Ariz. 409, 411, 590 P.2d 948, 950 (App. 1979).

Right-to-Be-Present Instruction

¶7 During trial, Lightsey-Copeland submitted a proposed instruction[1] to "cure" what he characterized as the prosecution's "negative inference" on his "absolute right to be present." On cross-examination, the prosecutor had asked Lightsey-Copeland whether he had access to police reports and statements, and also had him acknowledge he had been present in court and had taken notes while the witnesses testified. The trial court noted that the questions were "very factual and professionally asked . . . , and there was nothing bitter or derogatory or insinuatory about any of those things," and explicitly found no prosecutorial misconduct. The court permitted the prosecutor to refer to the questions for his argument, but "only as it may affect [Lightsey-Copeland's] believability," and "not insinuate that [Lightsey-Copeland] doesn't have the right to have

[1] Defendant's Requested Jury Instruction "A":

> You are instructed that a defendant in a criminal case has an absolute right to a trial and to attend that trial. You are instructed that the state is obligated to provide a defendant in a criminal trial with all police reports and statements of witnesses. You may draw no negative inferences from Mr. Lightsey-Copeland exercising his right to trial or reviewing materials the state is obligated to provide to him. Any such attempt by the state to create a negative impression of Mr. Lightsey-Copeland because he exercised his Constitutional rights is improper and is to be disregarded by you.

those things or be present." The court declined to give the requested instruction, finding there was "nothing to cure."[2]

¶8 As a general rule, a criminal defendant has the right to be present in the courtroom during proceedings in his case. U.S. Const. amends. VI, XIV; Ariz. Const. art. 2, § 24; Ariz. R. Crim. P. 19.2. When he takes the stand, however, "'his credibility may be impeached and his testimony assailed like that of any other witness.'" *Portuondo v. Agard*, 529 U.S. 61, 69 (2000), *quoting Brown v. United States*, 356 U.S. 148, 154 (1958); *see also Perry v. Leeke*, 488 U.S. 272, 282 (1989) ("[W]hen [a defendant] assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve the truth-seeking function of the trial—are generally applicable to him as well."). Lightsey-Copeland acknowledges there is no violation of due process for a prosecutor to remark on the fact that a defendant had opportunity to hear evidence and tailor his own testimony accordingly. He argues, however, that he was entitled to an instruction informing the jury of his right to attend his trial and the state's obligation to provide him with reports and witness statements which he was entitled to review.

¶9 In his closing, the prosecutor pointed out that Lightsey-Copeland was the only witness that had the "ability to mold his testimony to what other people said," and "[t]hat affects, potentially, his credibility." He identified various gaps in the evidence that

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[2]The trial court also found the language of the proposed instruction to be "really a comment on the evidence and . . . potentially disparaging, unjustly so, to [the prosecutor]."

were explained by Lightsey-Copeland to his apparent advantage, and referred to his post-arrest statement to police, which conflicted with his in-court testimony. But the prosecutor did not say or imply that Lightsey-Copeland did not have a right to be present at his trial or to read the statements and reports he had been given. We agree there was nothing to cure and the trial court did not abuse its discretion in refusing the proposed instruction.[3]

Third-Party Culpability Instruction

¶10 Lightsey-Copeland argues the trial court's failure to instruct the jury *sua sponte* as to third-party culpability was fundamental error in violation of his constitutional rights. It is fundamental error for a trial court to fail to instruct on matters vital to proper consideration of the evidence "'even if not requested by the defense.'" *State v. Johnson*, 205 Ariz. 413, ¶ 11, 72 P.3d 343, 347 (App. 2003), *quoting State v. Avila*, 147 Ariz. 330, 337, 710 P.2d 440, 447 (1985). We need not, however, engage in fundamental-error

[3]Lightsey-Copeland also analogizes to the Arizona Victim's Bill of Rights, which permits a victim to refuse to be interviewed by the defense, and if the defendant comments at trial on the refusal, "the court shall instruct the jury that the victim has the right to refuse an interview under the Arizona Constitution." A.R.S. § 13-4433(A), (F). But that instruction is not designed to protect a constitutional right, it is simply explanatory. *State v. Riggs*, 189 Ariz. 327, 333, 942 P.2d 1159, 1165 (1997) (legislature's intent in requiring instruction "merely to explain to the jury, in cases where the evidence of the refusal came in because it was relevant to some issue in the case, that the victim had a constitutional right to refuse a pretrial interview"). At trial, counsel may comment on a victim's refusal of a pretrial interview. *Id.* at 331, 942 P.2d at 1163 ("[T]he victim has no blanket constitutional right to be free from questioning at trial about the victim's refusal of a pretrial interview."). The statute does not authorize or condemn comments on the refusal. *Id.* at 333, 942 P.2d at 1165.

analysis in this case. Our supreme court has held that third-party culpability instructions are not generally required even when requested by the defense at trial provided the substance of the instruction was adequately covered. *State v. Parker*, 231 Ariz. 391, ¶¶ 55-56, 296 P.3d 54, 68 (2013), *petition for cert. filed* (U.S. Jun. 12, 2013) (No. 12-10818). The substance of a third-party culpability instruction is adequately covered where "the court instructed the jury on the presumption of innocence and the State's burden of proving beyond a reasonable doubt all elements of the crimes charged." *Id.* ¶ 56.

¶11 The jury in this case was properly instructed on the presumption of innocence and the state's burden of proving reasonable doubt.[4] A court need not give an instruction when its substance is adequately covered by other instructions. *State v. Rodriguez*, 192 Ariz. 58, ¶ 16, 961 P.2d 1006, 1009 (1998); *see also State v. Bolton*, 182

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[4]The jury was instructed:

> The defendant is presumed by law to be innocent.
>
> . . . [T]he state must prove every part of the charges beyond a reasonable doubt.
>
> The state has the burden of proving the defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the state's proof must be more powerful than that. It must be beyond a reasonable doubt.
>
> Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt.

Ariz. 290, 309, 896 P.2d 830, 849 (1995) ("[W]hen a jury is properly instructed on the applicable law, the trial court is not required to provide additional instructions that do nothing more than reiterate or enlarge the instructions in defendant's language."), *citing State v. Salazar*, 173 Ariz. 399, 409, 844 P.2d 566, 576 (1992). The trial court here did not err by failing to instruct the jury *sua sponte* on third-party culpability, much less commit fundamental error.

Ruling on Bystander Comments

¶12 Lightsey-Copeland next contends the trial court erroneously restricted the use at trial of comments overheard by an officer from bystanders, uttered minutes after the shooting, purporting to identify Charles as the shooter. When the first officer arrived, he observed a crowd surrounding the victim, and he testified it was "chaotic," with "different people . . . saying different things." As the officer was attempting to speak to the victim, he heard "several people" in the crowd referring to Jennifer, Charles's girlfriend, as "the shooter's girlfriend," and when the officer asked, "[W]ho did this?" he heard "people blurt[] out" that "it was a large black man that shot David." Those individuals apparently left the scene and could not be identified. In a sidebar ruling, the trial court determined the statements were hearsay and later barred defense counsel from using them for their truth during his closing argument. Lightsey-Copeland argues the court erred in not treating the comments as excited utterance exceptions to the hearsay rule.

¶13 Hearsay is "a statement . . . the declarant does not make while testifying at the current trial or hearing . . . offer[ed] in evidence to prove the truth of the matter asserted in the statement," Ariz. R. Evid. 801(c),[5] and is inadmissible unless an exception applies, Ariz. R. Evid. 802, 803. One exception to the rule is excited utterance—a "statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Ariz. R. Evid. 803(2). This exception "turns on three factors: there must be a startling event, the words must be spoken soon afterwards, and the words must relate to the startling event." *State v. Hausner*, 230 Ariz. 60, ¶ 63, 280 P.3d 604, 621 (2012).

¶14 When a declarant-bystander is unidentified, "courts are necessarily reluctant to admit out-of-court declarations '[p]rincipally because of uncertainty that a foundation requirement has been satisfied, such as the impact of the event on the declarant.'" *State v. Bass*, 198 Ariz. 571, ¶ 28, 12 P.3d 796, 803 (2000), *quoting* J. Strong, *McCormick on Evidence* § 272 (4th ed. 1992) (alteration in *Bass*). Although application of the excited utterance exception is not confined "solely to indisputably reliable witnesses," other facts must show the "statements were given under circumstances indicating reliability." *State v. Whitney*, 159 Ariz. 476, 484, 768 P.2d 638, 646 (1989) (although witnesses gave false names and addresses, circumstances indicated reliability: witnesses were neutral, each

[5]The Arizona Rules of Evidence were amended effective January 1, 2012, but the only changes potentially relevant here were purely stylistic and were not meant to change any ruling on the admissibility of evidence. *See* Ariz. R. Evid. 801 cmt., 802 cmt., 803 cmt. For ease of reference, we cite the current versions.

separately told the same story while still excited, and both corroborated what the victims said). Additionally, the evidence must indicate the hearsay declarant personally observed the matter of which he or she speaks. *See State v. Dixon*, 107 Ariz. 415, 418, 489 P.2d 225, 228 (1971).

¶15 The trial court found that the statements did not satisfy the test for excited utterances, observing: "We don't know about where these people got the information that they're relaying, how they know it, what condition . . . they were in. We don't even know who they are." Given the lack of foundation for the statements, the court did not abuse its discretion by limiting their use at trial.

¶16 Lightsey-Copeland alternatively argues for the first time on appeal that the comments were admissible as present sense impressions. Because the argument was not raised below, we review it only for fundamental error. *See State v. Henderson*, 210 Ariz. 561, ¶ 19, 115 P.3d 601, 607 (2005). To be admissible as a present-sense impression, a statement must satisfy three requirements: "The statement must describe an event or condition, that was perceived by the declarant, and the statement must be made immediately after the event." *State v. Tucker*, 205 Ariz. 157, ¶ 43, 68 P.3d 110, 119 (2003). Because there is no evidence that the declarants witnessed the shooting, the statements do not meet the second requirement and therefore would not have qualified as present sense impressions even had the issue been raised below. Accordingly, their preclusion was not error, much less fundamental error.

Criminal Restitution Order

¶17 We do, however, find fundamental error regarding an issue neither raised below nor on appeal. In its sentencing minute entry, the trial court stated it was reducing "all fines, fees, assessments and/or restitution" to a CRO, ordering that "no interest, penalties or collection fees [were] to accrue while [Lightsey-Copeland] is in the Department of Corrections." But the imposition of such a CRO before the defendant's sentence has expired "'constitutes an illegal sentence, which is necessarily fundamental, reversible error.'" *State v. Lopez*, 231 Ariz. 561, ¶ 2, 298 P.3d 909, 910 (App. 2013), *quoting State v. Lewandowski*, 220 Ariz. 531, ¶ 15, 207 P.3d 784, 789 (App. 2009).

Disposition

¶18 Because the portion of the trial court's minute entry order imposing the CRO is unauthorized by statute, we vacate it. In all other respects Lightsey-Copeland's conviction and sentence are affirmed.

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Judge

CONCURRING:

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Presiding Judge

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Judge