IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ALBA NYDIA MARTINEZ,
Appellant.

No. 2 CA-CR 2018-0113
Filed October 10, 2018

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Crim. P. 31.19(e).

Appeal from the Superior Court in Pima County
No. CR20172779001
The Honorable Gus Aragón, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
Joseph T. Maziarz, Chief Counsel
By Karen Moody, Assistant Attorney General, Tucson
Counsel for Appellee

Robert A. Kerry, Tucson
Counsel for Appellant

MEMORANDUM DECISION

Judge Eppich authored the decision of the Court, in which Presiding Judge Vásquez and Judge Espinosa concurred.

E P P I C H, Judge:

¶1 Alba Martinez appeals her convictions and sentences for two counts of criminal damage and one count of disorderly conduct. She argues the trial court erred by admitting a recording of a 9-1-1 call reporting her conduct in violation of the Confrontation Clause and the rule barring hearsay evidence. We affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the verdicts. *State v. Rushing*, 243 Ariz. 212, n.2 (2017). On the night of April 20, 2017, Martinez threw rocks and bricks at her former boyfriend's home and cars parked outside the home, including one belonging to her former boyfriend and another to his female friend. A witness called 9-1-1 and reported Martinez's vandalism as it occurred. When the 9-1-1 operator asked the caller if she knew the vandal, the caller described her as "my dad's ex crazy girlfriend." Upon further questioning, the caller proceeded to name and describe Martinez and report ongoing acts of vandalism. Police arrived and found Martinez with a brick in her hand. She was near cars with broken windows and other damage, with bricks around and inside them. Martinez was arrested at the scene.

¶3 A grand jury indicted Martinez on two felony counts of criminal damage and a misdemeanor count of disorderly conduct. The state alleged domestic violence as to the criminal damage count involving the former boyfriend's car. After a three-day trial, the jury found Martinez guilty on all counts and found the domestic violence allegation proved. The trial court suspended the imposition of sentence and placed Martinez on three years' probation with domestic violence conditions for each count, to be served concurrently. We have jurisdiction over Martinez's timely appeal pursuant to A.R.S. §§ 13-4031 and 13-4033(A)(1).

Discussion

¶4 Over Martinez's objections, the trial court admitted a redacted audio recording of the 9-1-1 call, concluding that it did not implicate the Confrontation Clause under *Davis v. Washington*, 547 U.S. 813 (2006), and that the statements at issue were admissible under the present sense impression exception to the hearsay rule. Martinez argues the court erred in admitting the recording because it included the caller's description of Martinez as the former girlfriend of the caller's father. According to Martinez, this description was an inadmissible testimonial statement under the Confrontation Clause because the caller did not testify and the information was not necessary for the police to respond to the emergency. Martinez also argues the description of her as the father's former girlfriend was inadmissible as a present sense impression because it was not based on information the caller was perceiving at the time. Martinez contends she was prejudiced because that description identified Martinez and the owner of one of the cars as having had a past sexual or romantic relationship, which established the state's allegation of domestic violence.

¶5 "Although we review a trial court's decision regarding the admission of evidence for abuse of discretion, we review the interpretation of court rules de novo." *State v. Winegardner*, 243 Ariz. 482, ¶ 5 (2018) (citation omitted). Likewise, "[w]e review *de novo* a superior court's decision to admit evidence over a Confrontation Clause objection." *State v. Damper*, 223 Ariz. 572, ¶ 7 (App. 2010).

Confrontation Clause

¶6 The Sixth Amendment's Confrontation Clause prohibits "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004); *see also* U.S. Const. amend. VI. Non-testimonial statements do not implicate the Confrontation Clause; states are free to craft their own hearsay rules governing which non-testimonial statements are admissible against a criminal defendant. *State v. King*, 212 Ariz. 372, ¶¶ 18-19 (App. 2006) (citing *Crawford*, 541 U.S. at 68).

¶7 Statements to police are not testimonial when made "under circumstances objectively indicating that the primary purpose of [the police questioning was] to enable police assistance to meet an ongoing emergency." *Davis,* 547 U.S. at 822. Therefore, when a person calls 9-1-1 for the primary purpose of preventing or stopping ongoing crimes, the

person's statements in the call are generally non-testimonial. *King*, 212 Ariz. 372, ¶ 29. "[E]ven . . . [an] operator's effort to establish the identity of the assailant, so that the dispatched officers might know whether they would be encountering a violent felon," does not render a resulting statement testimonial. *Davis*, 547 U.S. at 827-28.

¶8 Here, the challenged statements in the 9-1-1 call were the result of the operator's attempt to elicit the identity of a person who was then committing violent acts. The operator's questions aimed at establishing the person's identity (including "Who is the person?" and "Do you know her?") "were the exact type of questions necessary to allow the police to 'assess the situation, the threat to their own safety, and possible danger to the potential victim[s]' and to the public." *Michigan v. Bryant*, 562 U.S. 344, 376 (2011) (quoting *Davis*, 547 U.S. at 832). Because the caller described Martinez "under circumstances objectively indicating that the primary purpose of [the police questioning was] to enable police assistance to meet an ongoing emergency," the caller's statements were not testimonial. *See Davis*, 547 U.S. at 822. The trial court therefore did not violate Martinez's rights under the Confrontation Clause by admitting the redacted 9-1-1 call.

Hearsay

¶9 Out-of-court statements offered to prove the truth of the matter asserted are generally inadmissible under the rule against hearsay. Ariz. R. Evid. 801, 802. The present sense impression exception to the hearsay rule, however, allows admission of "[a] statement describing or explaining an event or condition, made while or immediately after the declarant perceived it." Ariz. R. Evid. 803(1). Martinez tacitly acknowledges that the caller's statements in the 9-1-1 call were generally the caller's present sense impressions of ongoing acts of vandalism, but contends that the "information about the relationship[] was not gained by viewing the person damaging the cars," but rather was "information gained from an undisclosed source" and therefore the caller's description of that relationship as "my dad's ex . . . girlfriend" was inadmissible hearsay.

¶10 Viewed in the context of the 9-1-1 operator's questioning, the portion of the caller's statement describing Martinez as "my dad's ex . . . girlfriend" is not an independent, intended assertion by the caller that a relationship existed between the person perceived and her father; rather, the purpose of the caller was to identify the person she was perceiving to answer the operator's question about who the caller saw. Put differently, the caller's intended assertion was that the person she identified was the

person she saw, and the assertion that Martinez had had a romantic relationship with her father is only implied. We do not analyze such an implied assertion as an independent assertion for hearsay purposes, even though those words implicitly conveyed the caller's belief that a relationship between the caller and her father had existed. *See State v. Palmer*, 229 Ariz. 64, ¶ 7 (App. 2012) ("[W]ords or conduct not intended as assertions are not hearsay even when offered as evidence of the declarant's implicit belief of a fact." (alteration in *Palmer*) (quoting *State v. Chavez*, 225 Ariz. 442, ¶ 8 (App. 2010))).

¶11 We acknowledge, however, that hearsay identifications[1] may present unique reliability concerns not explicitly reflected in the present sense impression exception. Identifications often rely on information learned in the past and therefore in some sense lack the attribute that makes present sense impressions reliable in the first place. *See United States v. McElroy*, 587 F.3d 73, 86 (1st Cir. 2009) ("Admission of a hearsay identification requires that we accept not only the trustworthiness of the declarant's observation, but also his ability to name the particular actors in the event or condition that he observed."). If information the declarant has gained in the past about a person is inaccurate, the declarant's identification of that person may be inaccurate. Indeed, concern about the reliability of hearsay identifications is reflected elsewhere in our rules of evidence. *See, e.g.*, Ariz. R. Evid. 801(d)(1)(C) (creating a hearsay exemption for a declarant's prior identification only when the declarant testifies and is subject to cross-examination). For this reason, at least one court has required independent guarantees of reliability before admitting identifications embedded within present sense impressions. *See McElroy*, 587 F.3d at 86 ("The admitting court must take care to ensure that, in addition to meeting the exception's explicit requirement that the statement be made as the declarant was perceiving the event or condition or immediately thereafter, it is evident that the declarant possessed the requisite information to make the asserted identification.").

¶12 Despite potential reliance on past-learned information, and the risk of inaccuracy resulting from that reliance, our rules of evidence make present sense impressions generally admissible. *See* Ariz. R. Evid. 803(1). In fact, the present sense impression exception omits certain explicit

[1]We use the term "identification" in this context to refer to the caller's description of the relationship between Martinez and the victim. In doing so, we do not intend to suggest that the statement is admissible as a non-hearsay identification. *See* Ariz. R. Evid. 801(d)(1)(C).

limits placed on the use of certain other hearsay exceptions. *Compare, e.g.*, *id.* (present sense impression exception available regardless of declarant availability), *with* Ariz. R. Evid. 804 (listing hearsay exceptions available only when declarant is unavailable as witness). The present sense impression rule also omits protections for criminal defendants that are inherent in some other hearsay exceptions. *Compare, e.g.*, Ariz. R. Evid. 803(1) (no requirement for corroborating circumstances), *with* Ariz. R. Evid. 804(b)(3)(B) (statement against declarant's penal interest admissible in criminal case only if it "is supported by corroborating circumstances that clearly indicate its trustworthiness"). The omission of such restrictions suggests that our supreme court did not intend to include such blanket conditions on the admission of present sense impressions. *See Sharpe v. Ariz. Health Care Cost Containment Sys.*, 220 Ariz. 488, ¶ 25 (App. 2009) (when requirement in one provision is not included in another, "we assume the absence of the requirement was intentional").

¶13 Martinez has not cited, and we have not found, any rule of evidence or case law prohibiting or placing conditions upon admission of an identification of a criminal defendant embedded within an otherwise-admissible present sense impression. Indeed, we have in previous cases upheld such identifications, albeit without analysis. *See, e.g.*, *Damper*, 223 Ariz. 572, ¶ 17 (declarant's identification by name of perceived person admitted as present sense impression). Many other jurisdictions have reached the same conclusion when confronted with identifications within present sense impressions, whether the identifications are by name, or, as here, by relationship. *See, e.g.*, *United States v. Delaplane*, 778 F.2d 570, 574 (10th Cir. 1985) (identification by name admitted as present sense impression); *United States v. Earley*, 657 F.2d 195, 198 (8th Cir. 1981) (same); *Jones v. State*, 780 N.E.2d 373, 376-77 (Ind. 2002) (declarant's identification of person as "her landlord" admissible as present sense impression because declarant "was contemporaneously describing the person"); *McDowell v. State*, 807 So. 2d 413, 421 (Miss. 2001) (identification by name admitted as present sense impression).

¶14 That is not to say that identifications within hearsay should always be admitted if embedded within a statement that qualifies under a hearsay exception. For example, in circumstances showing a lack of foundation to establish that the hearsay declarant had sufficient knowledge of the person identified, an identification would be inadmissible. *See* Ariz. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."). Or a court may preclude an identification because it is so unreliable that danger of unfair prejudice to the defendant

substantially outweighs the probative value of the identification. *See* Ariz. R. Evid. 403 (evidence inadmissible if its "probative value is substantially outweighed by a danger of . . . unfair prejudice"); *cf. State v. Roscoe*, 145 Ariz. 212, 221 (1984) (analyzing admissibility of scent identification by dog under Rule 403).

¶15 Finally, while a statement qualifying for a hearsay exception under Rule 803 may not be precluded merely because a witness is unavailable, under Rule 806, Ariz. R. Evid., a court may preclude an unreliable hearsay identification if the hearsay declarant is unidentified, depriving the defendant "not only of the right to cross-examine, but of any meaningful prospect of finding evidence of inconsistency or bias." *State v. Bass*, 198 Ariz. 571, ¶ 31 (2000) (quoting *Miller v. Keating*, 754 F.2d 507, 510 (3d Cir. 1985)). Because such reliability concerns do not appear to be present in this case, we cannot say that the trial court abused its discretion in admitting the recording.

¶16 Moreover, even if admitting the recording were error, it was harmless. Martinez's statements to law enforcement, admitted at trial without objection, independently established her domestic relationship with the victim, making the caller's description merely cumulative in proving the domestic violence allegation. *See State v. Williams*, 133 Ariz. 220, 226 (1982) ("[E]rroneous admission of evidence which was entirely cumulative constitute[s] harmless error.").[2]

Disposition

¶17 We affirm Martinez's convictions and sentences.

[2]In light or our analysis, we do not consider the state's alternative argument that the recording was admissible under the excited utterance exception to the hearsay rule.