IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

ROY EUGENE RUSHING,
Appellant.

No. 2 CA-CR 2021-0050
Filed March 10, 2022

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NOT FOR PUBLICATION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 Pinal County
No. S1100CR201901711
The Honorable Christopher J. O'Neil, Judge

AFFIRMED

COUNSEL

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MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 Roy Eugene Rushing appeals from his convictions and sentences for armed robbery and aggravated assault. He argues the trial court erred in its rulings concerning jury instructions, the admission of hearsay testimony, and the sufficiency of the evidence. 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." *State v. Gunches*, 225 Ariz. 22, n.1 (2010). At around 9:00 a.m. on July 5, 2019, Rushing and M.R. arrived at Karla C.-O.'s house in a blue two-door sedan M.R. had been borrowing from his mother. Twenty minutes later, Rushing, who had a revolver and was wearing a blue shirt and black sweatpants, left in that car with Rydell M., who had been staying at Karla's house.

¶3 Around 9:40 a.m., a man in all black clothing, wearing gloves, a "ski mask" face covering, and a beanie on his head, entered a bank in Coolidge, pointed a silver revolver at a bank teller, and demanded money. The teller opened her drawer, and the man reached over the counter and "grabbed her cash drawer," put it in a bag, and ran away.

¶4 A customer in her vehicle outside the bank saw a man wearing dark clothes and carrying a bag run out of the bank and down the sidewalk. She followed him as he ran to an alley, went over or around a wall, and got into the passenger side of a "bright blue" car. She called police and followed the car for a short time until she lost sight of it. The customer described to police the car's specific shade of bright blue, and when later shown photographs of M.R.'s mother's car, she was "[a] hundred percent" certain it was the one she had seen in the alley near the bank.

¶5 At about 9:45 a.m., M.R. telephoned his mother to be picked up from Karla's house. When she arrived, M.R. frantically told her he thought her car had been used in a bank robbery. In the days following the

robbery, M.R. and his mother could not locate her vehicle, but Rydell eventually told Karla where it could be found, and Karla arranged for M.R. to retrieve it.

¶6 A few days after the robbery, Karla was arrested by Coolidge police for an unrelated matter and provided information about the bank robbery. Rushing was eventually arrested and charged with armed robbery and aggravated assault of the bank teller. The jury found Rushing guilty of both counts, and the trial court sentenced him to concurrent prison terms, the longer of which is twenty-eight years. This appeal followed, over which we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A).

Jury Instructions

¶7 Rushing first contends the trial court erred in denying his request to instruct the jury on the state's failure to preserve exculpatory evidence pursuant to *State v. Willits*, 96 Ariz. 184 (1964), and in granting the state's request to instruct the jury on flight or concealment. We review a trial court's decision to grant or deny requested jury instructions for an abuse of discretion. *State v. Dann*, 220 Ariz. 351, ¶ 51 (2009). A party is entitled to a jury instruction on any theory reasonably supported by the evidence. *State v. Rodriguez*, 192 Ariz. 58, ¶ 16 (1998).

Willits Instruction

¶8 Rushing requested a *Willits* instruction based on law enforcement's failure to obtain the bank's surveillance footage from the day of the robbery. An officer with the Coolidge Police Department had responded to the bank and viewed the surveillance footage but had been unable to obtain or make a copy of it that day due to technical issues. The officer asked the bank to send her the footage but never received a usable recording. However, the officer's body-worn camera recorded the computer screen while she watched surveillance video of the robbery at the bank.

¶9 The trial court denied Rushing's request for a *Willits* instruction, explaining:

> [A]nything that is potentially helpful or exculpatory in the original version is present in the lower-quality version that was preserved. In other words, there's nothing in the record, nothing in this trial, that can suggest or from

> which the Court can infer that there's anything that even theoretically could exist in these circumstances that would be shown in a higher resolution that was not shown and is not available in the version that was preserved.

Rushing maintains the court abused its discretion because the portions of the surveillance video recorded by the body-worn camera were "not an adequate substitute for the actual video surveillance" and "[a] clearer picture provided by the original video . . . could have revealed details about the robber that may have exonerated" Rushing, given that identity was the "sole issue" at trial.

¶10 To be entitled to a *Willits* instruction, "a defendant must prove that (1) the state failed to preserve material and reasonably accessible evidence that could have had a tendency to exonerate the accused, and (2) there was resulting prejudice." *State v. Glissendorf*, 235 Ariz. 147, ¶ 8 (2014) (quoting *State v. Smith*, 158 Ariz. 222, 227 (1988)). Rushing has failed to establish either prong. His contention that the original footage could have shown "[t]hings in the background" which could "supply important clues to the identity of the robber" is entirely speculative. The officer who reviewed the original footage firsthand testified that she was unable to discern any defining features of the robber and could not see any information that could be used to identify the getaway car. *See State v. Togar*, 248 Ariz. 567, ¶ 27 (App. 2020) (defendant's assertion that missing portion of video recording would have contained helpful information "premised entirely on speculation" and only evidence in record was to contrary); *see also State v. Fulminante*, 193 Ariz. 485, ¶ 63 (1999) (no prejudice when defendant "would have benefitted little" from evidence state failed to preserve).

¶11 Moreover, as the trial court recognized, the surveillance footage recorded by the body-worn camera, which was admitted at trial, contains any exculpatory evidence that the original would have shown. A defendant is not entitled to a *Willits* instruction simply because police could have conducted a more exhaustive investigation. *See State v. Murray*, 184 Ariz. 9, 33 (1995); *see also State v. Willcoxson*, 156 Ariz. 343, 346-47 (App. 1987) (upholding denial of *Willits* instruction when police took black-and-white, instead of color, photographs of victim's injuries because available photographs were "satisfactory" even if not "the very best evidence"). We see no abuse of discretion in the court's denial of Rushing's request for a *Willits* instruction. *See Dann*, 220 Ariz. 351, ¶ 51.

Flight or Concealment Instruction

¶12 The state requested a jury instruction regarding Rushing's flight or concealment, which the trial court gave over Rushing's objection. That instruction read as follows:

> In determining whether the State has proved a defendant guilty beyond a reasonable doubt, you may consider any evidence of the defendant's running away, hiding, or concealing evidence, together with all the other evidence in the case. You may also consider the defendant's reasons for running away, hiding, or concealing evidence. Running away, hiding, or concealing evidence after a crime has been committed does not by itself prove guilt.

¶13 Rushing asserts "there was insufficient evidence to give that instruction" because "merely leaving" the scene of a crime is not evidence of flight. While that is generally true, "[r]unning from the scene of a crime, rather than walking away, may provide evidence of a guilty conscience prerequisite to a flight instruction." *State v. Lujan*, 124 Ariz. 365, 371 (1979). And, contrary to Rushing's argument, there was sufficient evidence in the record to support the instruction. *See Rodriguez*, 192 Ariz. 58, ¶ 16 (party entitled to instruction on "any theory reasonably supported by the evidence").

¶14 In particular, there was eyewitness testimony and other evidence that the bank robber ran, not walked, from the bank, attempted to climb over a wall, and got into a car waiting on the other side of the wall in the alley, which quickly drove away. That car did not belong to Rushing or Rydell, but was M.R.'s mother's car that had been borrowed that morning, and was not immediately returned. Further, there was evidence that Rushing and Rydell used "control cars" in an attempt to evade detection by law enforcement. A Coolidge detective explained that "control cars" referred to the abandonment or concealment of the original getaway car and use of "other cars to get away . . . that [police] weren't looking for." Thus, the evidence reasonably, if not abundantly, supported the flight or concealment instruction, and the trial court did not err in so instructing the jury. *See State v. Cutright*, 196 Ariz. 567, ¶ 12 (App. 1999) (key inquiry is whether defendant engaged in some type of eluding behavior "designed to camouflage" his participation in crime, thus manifesting consciousness of

guilt), *disapproved on other grounds by State v. Miranda*, 200 Ariz. 67, ¶ 5 (2001).

Motion for Judgment of Acquittal

¶15 Rushing next challenges the sufficiency of the evidence supporting his convictions. After the state rested, Rushing moved for judgment of acquittal pursuant to Rule 20, Ariz. R. Crim. P., arguing the state presented insufficient evidence regarding identity to support the charges. The trial court denied the motion, and we review its ruling de novo. *See State v. West*, 226 Ariz. 559, ¶ 15 (2011). Rule 20(a)(1) provides that after the close of evidence, "the court must enter a judgment of acquittal on any offense charged in an indictment . . . if there is no substantial evidence to support a conviction." Substantial evidence is that which a reasonable juror could accept as sufficient to support a conclusion of guilt beyond a reasonable doubt. *Fulminante*, 193 Ariz. 485, ¶ 24. On appeal, the "relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *State v. Cox*, 214 Ariz. 518, ¶ 8 (App. 2007) (emphasis omitted) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)).

¶16 Rushing does not challenge any element of the offenses except identity, arguing the "record lacks the substantial evidence necessary to support the jury's verdict[s] that Rushing is the person who robbed the . . . [b]ank." But there was ample circumstantial evidence identifying Rushing as the robber. *See State v. Harvill*, 106 Ariz. 386, 391 (1970) (circumstantial evidence accorded no less weight than direct). In addition to the evidence described above, which showed that Rushing, who had left Karla's house with Rydell in a blue car shortly before the robbery, was wearing similar dark clothing as the robber on a summer day and had a revolver like the one used in the robbery, Rydell and Rushing had talked about a bank robbery for two months before, even asking Karla to be the getaway driver and giving her specific instructions on how to act. Moreover, Rushing and Rydell had discussed using "control cars," to switch to another vehicle that the police would not be looking for, which the jury could infer is what happened after the robbery here.

¶17 To the extent Rushing challenges the evidence because it was elicited from Karla, whose credibility was questionable, we note that she was thoroughly questioned and cross-examined in that regard and it is well established that "the credibility of the witnesses and the weight and value to be given to their testimony are questions exclusively for the jury." *See*

State v. Cox, 217 Ariz. 353, ¶ 27 (2007). In sum, there was substantial evidence that Rushing committed the offenses for which he was charged and convicted. *See State v. Goudeau*, 239 Ariz. 421, ¶ 179 (2016) (evidence sufficient although defendant never directly identified and no physical evidence tied him to offenses); *Fulminante*, 193 Ariz. 485, ¶ 28 (finding evidence sufficient if "the jury could have pieced together a web of suspicious circumstances tight enough that a reasonable person could conclude, beyond a reasonable doubt, that Defendant was the perpetrator").

Admission of Hearsay Testimony

¶18 Rushing last contends the trial court erroneously admitted, over his objection, testimony from M.R.'s mother under the excited utterance exception to the rule against hearsay. We review such rulings for abuse of discretion. *State v. Tucker*, 205 Ariz. 157, ¶ 41 (2003). Pursuant to Rule 803(2), Ariz. R. Evid., an excited utterance is "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Thus, the three necessary criteria are: (1) a startling event; (2) the words are spoken soon after the event so as not to give the speaker time to fabricate or reflect; and (3) the words spoken relate to the startling event. *State v. Rivera*, 139 Ariz. 409, 411 (1984).

¶19 M.R.'s mother testified that on the day of the robbery, M.R., who had been using her blue car, telephoned her around 9:45 a.m. "crying. . . . frantic. . . . very emotional," and was "freaking out," asking her to pick him up from his friend's house. She arrived within three minutes, and M.R. "came out, pale, walking really quickly, got in the car, and just started crying," then told her, "Mom, I think the car was used in a bank robbery." The two then listened to a police alert, using M.R.'s phone as a law enforcement scanner, which indicated police were looking for "a blue, small car." The trial court overruled Rushing's hearsay objection, later explaining it was admitted as an excited utterance because M.R. "remain[ed] under the stress and excitement of being startled" on discovering "that his car had been used in a bank robbery and was possibly missing, and given [his] tone and demeanor and apparent emotional state, the statements were not a product of contest, calculation, or reflection."[1]

[1]Karla too testified that M.R. told her he thought his car was involved in the robbery. Rushing did not raise a hearsay objection below, and he has not challenged the admission of that testimony on appeal.

¶20 Rushing argues M.R. hearing sirens and listening to a police broadcast is not a startling event. But as the trial court correctly noted, the startling event was not simply those factors, it was hearing a police bulletin that indicated his mother's car had apparently been involved in a bank robbery. That event was sufficiently upsetting to M.R., as evidenced by his "freaking out," and "crying. . . . frantic. . . . very emotional" state. *See State v. Bass*, 198 Ariz. 571, ¶ 25 (2000) (sufficiency of startling event not questioned once court convinced witness experienced startling effect unless court has reason to believe excitement from other cause or event not startling as matter of law).

¶21 Nor do we agree with Rushing that "[t]here was a sufficient time gap between the startling event and the statement that [M.R.] had time to fabricate it." Police were called at 9:42 a.m., and M.R.'s mother testified she received the call from M.R. around 9:45 a.m. and arrived within minutes, at which point M.R. made the excited utterance. Thus, the time frame in which the bank robbery occurred, M.R. heard the police broadcast, and made the statement to his mother was—contrary to Rushing's apparent contention—very short. And, more importantly, M.R. remained in an "excited, upset state" when he made the statement to his mother.[2] *See State v. Anaya*, 165 Ariz. 535, 539 (App. 1990) (statement made within thirty minutes of startling event deemed excited utterance when declarant's physical and emotional condition showed she remained under stress of such event). We conclude the trial court did not abuse its discretion in admitting M.R.'s statement.[3] *See Tucker*, 205 Ariz. 157, ¶ 41.

Disposition

¶22 For the reasons stated above, Rushing's convictions and resulting sentences are affirmed.

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[2]We reject Rushing's apparent contention that M.R.'s statement was inherently unreliable—and therefore inadmissible—because of his drug use. *See State v. Jeffers*, 135 Ariz. 404, 420 (1983) (rejecting argument that drug use by declarant renders excited utterance inadmissible).

[3]Because we find no abuse of the trial court's discretion in admitting M.R.'s statement under Rule 803(2), we need not address Rushing's argument that it was inadmissible under Rule 803(3). *See Tucker*, 205 Ariz. 157, ¶ 41.