IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

THE STATE OF ARIZONA,
Appellee,

v.

CHRISTOPHER LANCE REYES,
Appellant.

No. 2 CA-CR 2021-0063
Filed August 26, 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NOT FOR PUBLICATION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 Gila County
No. S0400CR201900389
The Honorable Bryan B. Chambers, Judge

AFFIRMED

COUNSEL

Mark Brnovich, Arizona Attorney General
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MEMORANDUM DECISION

Vice Chief Judge Staring authored the decision of the Court, in which Presiding Judge Eppich and Judge Brearcliffe concurred.

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

¶1 Christopher Reyes appeals from his conviction and sentence for possession of a narcotic drug for sale. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the evidence in the light most favorable to sustaining the jury's verdicts and resolve all reasonable inferences against Reyes. *See State v. Felix*, 237 Ariz. 280, ¶ 30 (App. 2015). In August 2019, a Show Low Police Department detective assigned to the Gang and Immigration Intelligence Team Enforcement Mission task force observed Mary M. and Terri V. sitting in a car parked outside of a convenience store in Miami, Arizona. The detective recognized the car as belonging to Mary. Although the car belonged to Mary, Terri was in the driver's seat and Mary was in the passenger seat.

¶3 The detective checked Mary's license plate and discovered the car's insurance had been canceled. He then saw Reyes, who lived nearby, approach the passenger side of the car, carrying his young son in his arms. He talked to Mary through the open window and, after standing at the car window for less than a minute, walked back toward his house.

¶4 Terri and Mary drove out of the parking lot, and the detective conducted a traffic stop. He separated them, and Mary ultimately admitted to possessing drugs and produced a small bundle containing approximately 0.3 grams of heroin from the waistband of her pants. In a recorded conversation with the detective, Mary confirmed that she "had a pre-negotiated deal with [Reyes] to come buy heroin from him and to meet him" in the parking lot of the convenience store, and that he had "front[ed]"

her the drugs she had pulled from her waistband.[1] She stated she had not paid Reyes any money and, when the detective asked her whether she owed him money, she stated, "Well, yeah, probably."

¶5 The detective also spoke with Terri in a recorded conversation, during which she admitted to driving Mary to get heroin from Reyes. Specifically, Terri confirmed that her "understanding from Mary" was that she had arranged to meet Reyes at the convenience store to purchase one gram of heroin from him. The detective subsequently obtained a warrant, and officers searched Reyes's home, car, and person but did not find anything of evidentiary value.

¶6 The state charged Reyes with one count of possession of a narcotic drug for sale. Before trial, the state provided notice of its intent to introduce Mary's and Terri's recorded statements to the detective pursuant to Rule 807, Ariz. R. Evid., if they testified at trial that they had no memory of the incident and were therefore "unavailable" under Rule 804(a), Ariz. R. Evid. After unsuccessfully attempting to depose Mary regarding the details of her encounter with Reyes, the state asked the trial court to find that Mary was feigning memory loss and to "allow for impeachment with her prior inconsistent statements made to the officer at the time of her arrest."

¶7 Following an evidentiary hearing, the trial court found that Mary's "testimony in the [deposition] transcript that she does not remember" was not credible, noting "the most likely explanation is that she's afraid of testifying, because she[] doesn't want to be accused of being a snitch." The court declined to rule on the admissibility of the recording at that time, noting that its decision would depend on Mary's testimony at trial. Although defense counsel acknowledged that a similar problem might arise with respect to Terri's testimony, the parties did not address the admissibility of Terri's recorded statement at the hearing.

¶8 At trial, Terri testified she suffered from short-term memory loss and had "a hard time differentiating" between what she had been told about the incident and what she "really remembered." She testified she remembered Mary had asked for a ride to the convenience store in Miami because "[s]he wanted to talk to" Reyes and Mary had talked to Reyes

[1]Terri testified at trial that a "front," which is "like a loan," occurs when someone is "given the drugs without money and paying them" but "make[s] arrangements to pay later."

through the car window, but she could not remember "what they talked about." The state sought to "refresh [Terri's] recollection" with the recording of her conversation with the detective. Reyes did not object, and Terri used headphones to listen to the conversation.

¶9 Terri stated she recognized her voice on the recording, and when asked if the recording helped her remember why she had driven Mary to the convenience store, she stated, "I just—I guess I assumed that's what it was about, perhaps, I don't know. I can't really remember." When the state asked her whether she wanted to be testifying in court that day, she responded that she was nervous about being in the courtroom, further stating that, "with all the police around [her] house and then saying [she was] going to get hurt and stuff, [she] never felt threatened all of this time. [She] didn't get scared until last night."[2] Terri subsequently agreed that her conversation with the detective had occurred "[w]ithin a few minutes" of Mary's interaction with Reyes, that her memory of what had happened was better at the time of the recording, and that she had been telling the truth when speaking to the detective.

¶10 The state moved to publish the recording as a recorded recollection pursuant to Rule 803(5), Ariz. R. Evid., and Reyes objected, arguing that the recorded statement constituted hearsay and its admission would create a "*Crawford* issue."[3] The state countered that because Terri was available for cross-examination, admission of the statement would not violate Reyes's right to confront witnesses against him. It further argued Terri's statement could be used for impeachment purposes and urged the court to find that Terri was feigning memory loss. Reyes responded that impeachment with Terri's recorded statement was improper because her inability to remember did not render her testimony inconsistent with her prior statement.

¶11 Relying on *State v. Salazar*, 216 Ariz. 316, n.2 (App. 2007), for its description of the procedure for refreshing a witness's recollection under Rule 612, Ariz. R. Evid., and introducing a recorded recollection under Rule

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[2] On cross-examination, Terri clarified that "[n]obody ha[d] threatened [her]" and she was "not afraid of . . . Reyes."

[3] *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) (Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had . . . a prior opportunity for cross-examination.").

803(5), the trial court concluded the state was "entitled to impeach [Terri] by playing the statement" because she had "testified to many details about what happened that night, but as to the pertinent details . . . [that] possibly inculpate[] the defendant, she says she cannot remember." It further stated that "some of what's in this interview ha[d] already been testified [to]," noting that Reyes had gone into "some detail about [Terri's] interview in cross-examination of the Detective," and the state had subsequently elicited testimony on redirect indicating "it was [Terri] . . . who came up with . . . Reyes . . . as the person involved" and "mentioned it was heroin." Although the court ruled the state could play Terri's statement for the jury, it concluded the statement would "not be admitted as an exhibit." The state subsequently played the recording for the jury, and Terri confirmed it was "consistent with what [she] remember[ed]."

¶12 The next day, Mary testified that although she had had a small amount of heroin in the waistband of her pants on the date in question, she had not arranged to get heroin from Reyes and he had not "fronted" her the drugs. Over Reyes's objection, the trial court allowed the state to publish Mary's recorded statement to the jury without admitting it into evidence.[4]

¶13 Reyes was convicted as charged and sentenced to a 9.25-year prison term. 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).

Discussion

¶14 Reyes argues the trial court erred in allowing the jury to hear the recording of Terri's conversation with the detective because the introduction of such "hearsay statements" violated his right to "confront witnesses against him." Specifically, he argues that although a "claimed inability to recall, when disbelieved by the trial judge, may be viewed as inconsistent with previous statements," *State v. King*, 180 Ariz. 268, 275 (1994) (quoting *United States v. Rogers*, 549 F.2d 490, 496 (8th Cir. 1976)), the court in this case "made no finding at all regarding [Terri's] inability to recall." Thus, Reyes contends, the court erred in relying on *Salazar* for admission of the recording absent "a finding that [Terri's] inability to recall was feigned."

[4]Reyes does not raise any argument on appeal with respect to Mary's recorded statement.

¶15 The Confrontation Clause guarantees a defendant the right to confront witnesses against him. U.S. Const. amend. VI; *see also* Ariz. Const. art. II, § 24. This guarantee prohibits admission of testimonial hearsay statements by a witness who does not appear at trial, unless the witness is unavailable and the defendant had a prior opportunity for cross-examination. *Crawford v. Washington*, 541 U.S. 36, 53-54, 68 (2004). We generally review evidentiary rulings for an abuse of discretion, but we review such rulings de novo when they implicate the Confrontation Clause. *State v. Ellison*, 213 Ariz. 116, ¶ 42 (2006).

¶16 Out-of-court statements offered to prove the truth of the matter asserted are generally inadmissible unless an exception to the rule against hearsay applies. Ariz. R. Evid. 801(c), 802. One such exception is a recorded recollection under Rule 803(5). A record qualifies as a recorded recollection if it "is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately," "was made or adopted by the witness when the matter was fresh in the witness's memory," and "accurately reflects the witness's knowledge." Ariz. R. Evid. 803(5). If these requirements are satisfied, the record may be read or played into evidence but cannot be received as an exhibit by the jury to consider during deliberations unless offered by an adverse party. *Id.*; *see Salazar*, 216 Ariz. 316, n.2. A video or audio recording may qualify as a "record" for these purposes. *See State v. Martin*, 225 Ariz. 162, ¶ 11 (App. 2010).

¶17 Additionally, pursuant to Rule 801(d)(1)(A), a witness's prior statement may be admissible as non-hearsay if "[t]he declarant testifies and is subject to cross-examination about [the] prior statement, and the statement . . . is inconsistent with the declarant's testimony." *See also* Ariz. R. Evid. 613(b) (providing for admission of extrinsic evidence of prior inconsistent statement). A party may impeach its own witness with the witness's prior inconsistent statement, Ariz. R. Evid. 607, and such statements may be admitted both for impeachment and as substantive evidence, *State v. Hernandez*, 232 Ariz. 313, ¶ 47 (2013). The trial court must first determine that the statements are inconsistent as a precondition to admissibility. *Id.* ¶ 41.

¶18 "For purposes of Rule 801(d)(1)(A), Arizona law draws a distinction between a true and a feigned loss of recall. Where the asserted loss is genuine, the prior statement is deemed not inconsistent under this rule, but if the loss is mere fakery, the statement falls within the rule." *State v. Joe*, 234 Ariz. 26, ¶ 14 (App. 2014) (quoting *State v. Anaya*, 165 Ariz. 535, 538 (App. 1990)). As Reyes acknowledges, "[a] claimed inability to recall,

when disbelieved by the trial judge, may be viewed as inconsistent with previous statements." *King*, 180 Ariz. at 275 (quoting *Rogers*, 549 F.2d at 496). Further, inconsistency "is not limited to cases in which diametrically opposite assertions have been made." *Id.* (quoting *Rogers*, 549 F.2d at 496); *see Joe*, 234 Ariz. 26, ¶¶ 15-16 (state could impeach victim with her prior statements to police because, at trial, the victim "repeatedly sought to avoid answering specific questions regarding the assault, stating (after follow up) that she 'would rather not say'"). The trial court "has considerable discretion in determining whether a witness's evasive answers or lack of recollection may be considered inconsistent with that witness's prior out-of-court statements." *Salazar*, 216 Ariz. 316, ¶ 15.

¶19 Terri's conversation with the detective was admissible as both a recorded recollection under Rule 803(5) and a prior inconsistent statement under Rule 801(d)(1)(A). *See State v. Carlson*, 237 Ariz. 381, ¶ 7 (2015) (we will affirm trial court's ruling if legally correct for any reason). As noted in *Salazar*, "a witness may be shown a writing or other evidence, including listening to a recording to attempt to refresh the witness's recollection." 216 Ariz. 316, n.2. After listening to the recording outside the presence of the jury, the witness may testify if her recollection is refreshed. *Id.* "If her recollection is not refreshed, only then can the record be 'read [or played] into evidence but cannot be received as an exhibit unless offered by the adverse party.'" *Id.* (alteration in *Salazar*) (quoting Ariz. R. Evid. 803(5)).

¶20 That is precisely what happened in this case. After testifying that she did not know why Mary had wanted to meet Reyes at the convenience store and that she could not remember what Mary and Reyes had talked about, Terri listened to the recording using headphones. She subsequently testified that although she recognized her voice on the recording, she could not "really remember" why she had driven Mary to the convenience store that day, and the recording was then played for the jury but not admitted as an exhibit. Further, as discussed above, Terri testified she had made the statement to the detective "[w]ithin a few minutes" of Mary's interaction with Reyes, her memory of what had happened was better at the time of the recording, and she had been telling the truth when speaking to the detective. Thus, Terri's testimony satisfied the foundational requirements of Rule 803(5), and the court did not err in allowing the state to play the recording for the jury.

¶21 Additionally, Terri's recorded statement was admissible under Rule 801(d)(1)(A). Contrary to Reyes's assertion, the trial court's statements indicate it believed Terri was feigning her lack of memory, and

the record supports this conclusion. Indeed, the court explained that the state was "entitled to impeach [Terri] by playing the statement" because she had "testified to many details about what happened that night, but as to the pertinent details . . . [that] possibly inculpate[] the defendant, she says she cannot remember." Terri's prior recorded statement was therefore admissible as inconsistent with her trial testimony. *See* Ariz. R. Evid. 801(d)(1)(A); *Salazar*, 216 Ariz. 316, ¶¶ 15-16; *State v. Robinson*, 165 Ariz. 51, 58-59 (1990) (no abuse of discretion in admitting extrinsic evidence of out-of-court statement under Rule 613(b) when trial court could not tell if witness was being evasive or simply could not remember); *State v. Olquin*, 216 Ariz. 250, ¶ 10 (App. 2007) (trial court in best position to make credibility determination). And, although an otherwise admissible prior inconsistent statement may be excluded under Rule 403, *State v. Sucharew*, 205 Ariz. 16, ¶ 20 (App. 2003), Reyes did not object to Terri's prior statement on that ground below and fails to meaningfully develop such an argument on appeal, instead asserting only that he was prejudiced as a result of the introduction of the statement because "[t]here was no direct evidence or testimony that [he] furnished heroin to [Mary], only police interrogations played to the jury," *see Joe*, 234 Ariz. 26, n.3; *State v. Allred*, 134 Ariz. 274, 276-77 (1982) (setting forth factors to consider in addressing Rule 403 objection to prior inconsistent statements); *State v. Bolton*, 182 Ariz. 290, 298 (1995) (insufficient argument waives claim on appeal).

¶22 Moreover, publication of Terri's recorded statement to the jury did not violate Reyes's rights under the Confrontation Clause. The Confrontation Clause does not bar testimonial hearsay when the declarant appears at trial and is subject to cross-examination. *Crawford*, 541 U.S. at 59 n.9 ("[W]e reiterate that, when the declarant appears for cross-examination at trial, the Confrontation Clause places no constraints at all on the use of his prior testimonial statements."); *see also State v. Medina*, 232 Ariz. 391, ¶ 54 (2013) ("The Confrontation Clause bars admission of out of court testimonial evidence unless the defense has had an opportunity to cross-examine the declarant." (quoting *State v. Parker*, 231 Ariz. 391, ¶ 38 (2013))). And, although the Confrontation Clause prohibits the use of a testimonial pretrial statement in lieu of testimony from a witness unless there was a prior opportunity to cross-examine that witness, *Crawford*, 541 U.S. at 68, it does not preclude the use of "a prior statement to impeach a witness or refresh the witness's memory," *Salazar*, 216 Ariz. 316, ¶ 7.

¶23 Here, Terri testified at trial and Reyes cross-examined her after the recording was played for the jury. Further, Terri's statement was used to refresh her memory and impeach her testimony. Thus, Reyes's

confrontation rights were not violated by the introduction of Terri's recorded statement. *See Crawford*, 541 U.S. at 59 n.9; *Salazar*, 216 Ariz. 316, ¶ 7. "And, the fact that [Terri] testified that [s]he could no longer remember certain details of the crime, even assuming h[er] claim were true, does not result in a violation of the confrontation clause." *King*, 180 Ariz. at 276; *see Salazar*, 216 Ariz. 316, ¶ 9 (confrontation rights do not guarantee witnesses "will not give testimony 'marred by forgetfulness, confusion, or evasion,'" instead affording only a "full and fair opportunity to probe and expose . . . infirmities" in witnesses' testimony through cross-examination (quoting *Delaware v. Fensterer*, 474 U.S. 15, 21-22 (1985))); *State v. Real*, 214 Ariz. 232, ¶ 10 (App. 2007) (noting confrontation rights do not include effective cross-examination).

Disposition

¶24 For the foregoing reasons, we affirm Reyes's conviction and sentence.