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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JEFFREY D. DELOACH, Appellant.	2 CA-CR 2010-0008 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CR200900149

Honorable James L. Conlogue, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Kent E. Cattani and Amy M. Thorson — Tucson
Attorneys for Appellee

Harriette P. Levitt — Tucson
Attorney for Appellant

E S P I N O S A, Judge.

¶1 After a jury trial, Jeffrey Deloach was convicted of two counts of aggravated assault and sentenced to enhanced, presumptive prison terms amounting to

fifteen years' imprisonment. He raises a number of issues on appeal, none of which merits reversal.

Factual and Procedural History

¶2 We view the facts in the light most favorable to sustaining the jury's verdict. *State v. Tamplin*, 195 Ariz. 246, ¶ 2, 986 P.2d 914, 914 (App. 1999). One night in March 2009, M. and her friends, J. and N., drove to M.'s home so she could pick up clothes to stay the night with N. M. asked J. and N. to wait in the car so that Deloach, who was at her house, would not see them. A few minutes later, N. heard Deloach "being loud." Carrying her baby, N. went into the home, claiming to need to use the bathroom. Inside, Deloach pointed a gun at M. and N. and ordered N. to leave, threatening to shoot both her and the baby. He then hit M. several times. N. went outside and told J. that Deloach was "beating [M.] up," and J. called the police. When police arrived at the scene, N. made additional statements about the assaults. Deloach was later arrested, convicted, and sentenced as outlined above. We have jurisdiction over this appeal pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

Discussion

Assault Committed Against N.

¶3 Before trial, N. moved out of the country and, as a result, the trial court granted the state's motion and permitted it to read to the jury N.'s transcribed deposition testimony in which she described the assault. The transcript was not admitted into evidence at trial, however, nor did the court reporter transcribe its contents when it was read. Accordingly, the deposition testimony was not included in the record on appeal. In

his opening brief, Deloach challenged his conviction for assaulting N. based on the absence of her testimony in the record. The state subsequently supplemented the record with N.'s deposition transcript, which provides ample evidence that Deloach pointed a gun at N. and threatened her, thus committing aggravated assault with a deadly weapon or dangerous instrument. *See* A.R.S. §§ 13-1203; 13-1204(A)(2) (aggravated assault committed by using deadly weapon or dangerous instrument to place another person in reasonable apprehension of imminent physical injury). He does not otherwise dispute the sufficiency of the evidence against him on this charge.[1]

Hearsay Statements

¶4 Deloach next contends the trial court erred in admitting N.'s out-of-court statements to witnesses about the assaults, arguing they were inadmissible hearsay. Over Deloach's objection, the trial court permitted the state to elicit from J. and M. statements N. had made at the scene about the assaults on M. and herself. The court concluded such statements were both excited utterances and, in light of N.'s deposition testimony, prior consistent statements. J. thereafter testified that N. had told her Deloach had threatened her and pointed a gun at her baby, and M. testified N. had told her Deloach had put the gun to the heads of both N. and her daughter. We review a trial court's evidentiary

[1]Deloach filed a motion to strike the supplemental record, which this court denied. In his reply brief, he contends, citing no authority, that we nevertheless should disregard the transcript, implying that, in granting the state's motion to supplement the record with this transcript, the trial court improperly "assist[ed] the State in sustaining a conviction." We are not obliged to address this unsupported argument, but we fail to see how transmitting to this court a record of evidence actually presented to the jury is in any way improper or prejudicial.

rulings for a clear abuse of discretion. *State v. Amaya-Ruiz*, 166 Ariz. 152, 167, 800 P.2d 1260, 1275 (1990).

¶5 Under Rule 803(2), Ariz. R. Evid., an out-of-court statement is admissible if it relates "to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Accordingly, for such a statement to be admissible, there must be a startling event, the words must be spoken contemporaneously or soon enough after the event to prevent the speaker from fabricating or reflecting on the situation, and the statement must relate to the event. *State v. Cruz*, 218 Ariz. 149, ¶ 54, 181 P.3d 196, 208 (2008). "The spontaneity of a statement is determined from the totality of the circumstances[,]" considering elements such as "the length of time between the event and statement," the condition of the declarant, and "the nature of the offense." *State v. Beasley*, 205 Ariz. 334, ¶ 30, 70 P.3d 463, 470 (App. 2003).

¶6 Without squarely addressing the factors that govern the admissibility of excited utterances, Deloach asserts that N.'s "hearsay statements do not rise to the level of greater credibility contemplated by the excited utterance exception" and should not have been admitted. In support of this contention, Deloach speculates that his pointing a gun at N. and her child "was not as startling to [N.] as it might be to individuals" who did not associate with gang members.[2] This argument is pure speculation and, in any event, "[w]hether hearsay evidence is 'reliable' is largely a matter of discretion with the trial

[2]In his reply brief, Deloach asserts that N., J., and M., were all gang members, a claim not supported by the record.

court." *State v. Marquez*, 127 Ariz. 3, 6, 617 P.2d 787, 791 (App. 1980); *see also State v. Parks*, 211 Ariz. 19, ¶ 39, 116 P.3d 631, 639 (App. 2005) (trial court properly determined witness experienced startling event). Deloach also highlights the inconsistencies between N.'s statements and M.'s and J.'s accounts of the events, implying those inconsistencies support the conclusion that N. "had ample opportunity to confabulate" her story. But whether a speaker has had time to reflect on a statement is, again, a question for the trial court, *see Beasley*, 205 Ariz. 334, ¶¶ 30-31, 70 P.3d at 470; *see also Byars v. Ariz. Public Serv. Co.*, 24 Ariz. App. 420, 423 (1975) (duty of trial court to consider totality of circumstances to determine whether speaker under "stress of nervous excitement or shock"), and contradictory testimony "goes to the weight of the evidence, not its admissibility," *State v. Bowie*, 119 Ariz. 336, 342, 580 P.2d 1190, 1196 (1978). Accordingly, Deloach has not given us, nor have we found, any reason to conclude the trial court abused its discretion in admitting as excited utterances the statements N. made at the scene of the assaults shortly after they occurred.[3]

Assault of M.

¶7 Deloach also contends the evidence presented at trial was insufficient to support his conviction for aggravated assault of M. But his argument that there was no evidence he pointed a gun at M. is based on his contention that N.'s deposition is not properly part of the record on appeal, an argument we have rejected. "We review the

[3]Because we affirm the trial court's admission of this evidence on the basis of Ariz. R. Evid. 803(2), we need not evaluate its conclusion that N.'s statements also qualified as prior consistent statements.

sufficiency of evidence presented at trial only to determine whether substantial evidence supports the jury's verdict . . . ." *State v. Cox*, 217 Ariz. 353, ¶ 22, 174 P.3d 265, 269 (2007). And substantial evidence is defined as that which "reasonable persons could accept as sufficient to support a guilty verdict beyond a reasonable doubt." *State v. Hughes*, 189 Ariz. 62, 73, 938 P.2d 457, 468 (1997). As the state points out, one of the officers who responded to the assault scene testified that, when he arrived, M. told him Deloach had pointed a gun at her and threatened her. Additionally, N. acknowledged in her deposition that she had told responding officers Deloach had pointed a gun at M. inside the home. Accordingly, there was sufficient evidence to support the jury's guilty verdict on this charge.

Enhanced Sentence

¶8 Finally, relying on *Apprendi v. New Jersey*, 530 U.S 466 (2000), Deloach contends the trial court committed fundamental error when it imposed enhanced sentences based on dangerousness when that issue had not been submitted to the jury. We review de novo the legality of a sentence. *State v. Rasul*, 216 Ariz. 491, ¶ 20, 167 P.3d 1286, 1291 (App. 2007).

¶9 Although Deloach is correct that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury," *Apprendi*, 530 U.S at 490, the question of dangerousness need not be submitted to the jury when it is "inherent in the crime." *State v. Gatliff*, 209 Ariz. 362, ¶¶ 17- 18, 102 P.3d 981, 984-85 (App. 2004) (dangerousness inherent in arson of occupied structure because fire is dangerous instrument); *see also State v. Smith*, 146 Ariz. 491, 498-99, 707 P.2d 289, 296-

97 (1985) (dangerousness inherent in armed robbery because deadly weapon element of offense). Because Deloach was charged with aggravated assault with a deadly weapon or dangerous instrument, the dangerousness was inherent in the offense of which he was convicted. *See Blakely v. Washington*, 542 U.S. 296, 303 (2004) (statutory maximum for *Apprendi* purposes is maximum sentence that may be imposed based solely on facts reflected in jury verdict or defendant's admissions); *Gatliff*, 209 Ariz. 362, ¶¶ 10, 17, 102 P.3d at 983-85 (no separate dangerousness finding required under *Apprendi* and *Blakely* when dangerousness inherent in offense). Accordingly, the trial court did not err in imposing an enhanced sentence.

Conclusion

¶10 Deloach's convictions and sentences are affirmed.

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

CONCURRING:

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Presiding Judge

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge