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2012 IL App (3d) 100364-U

Order filed January 24, 2012

IN THE
APPELLATE COURT OF ILLINOIS
THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE)	Appeal from the Circuit Court
OF ILLINOIS,)	of the 12th Judicial Circuit
)	Will County, Illinois
Plaintiff-Appellee,)	
)	Appeal No. 3-10-0364
v.)	Circuit No. 09-CM-4387
)	
RYAN G. ROESEL,)	Honorable
)	Marilee Viola
Defendant-Appellant.)	Judge, Presiding.

JUSTICE WRIGHT delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

- ¶ 1 *Held:* Complainant did not testify at trial, and her out-of-court statements to the police were excited utterances, but testimonial in nature. Therefore, the court's admission of the out-of-court statements violated defendant's constitutional right to confront witnesses. However, any resulting error was harmless in this case. Defendant's conviction is affirmed.
- ¶ 2 Defendant appeals his conviction for domestic battery on the basis that the trial court improperly allowed complainant's out-of-court statements to a police officer to be admitted as substantive evidence. We conclude the out-of-court statements qualified as an excited utterance,

but were testimonial in nature. Therefore, the admission of the statements violated defendant's right to confront witnesses, but the resulting error was harmless.

¶ 3

FACTS

¶ 4 On November 30, 2009, the State charged defendant with the offense of domestic battery alleging that on November 28, 2009, defendant knowingly made contact of an insulting or provoking nature with Amanda Beran, a household or family member, by grabbing Beran about the body. Following a bench trial conducted on March 15, 2010, the trial court found defendant guilty of domestic battery.

¶ 5 The testimony at trial included the testimony of officer Kilgore, who testified that on November 28, 2009, he went to 1104 Elizabeth in Joliet, Illinois in response to a dispatch regarding a 911 hang up. Kilgore said that the window blinds to the residence were open, and he was able to observe defendant inside the residence, walking toward the back door in the kitchen and looking out the window. Kilgore also heard defendant yelling. Kilgore then observed Beran, the complainant, run toward the front door of the residence. Shortly thereafter, Kilgore watched defendant come from the rear of the residence, grab Beran, "and pick her up and throw her onto the couch inside the living room." Defendant pointed at Beran and told her to "stay there."

¶ 6 Kilgore then began pounding on the door, saying "Police, come open up the front door." Defendant answered the front door, and Kilgore immediately detained defendant. Defendant voluntarily stated, "that girl is crazy and she is messed up."

¶ 7 Thereafter, Kilgore made contact with Beran in the kitchen of the residence. Kilgore described Beran as "upset" and "crying." The prosecutor asked Kilgore what Beran said to him. Defense counsel objected, claiming hearsay. The prosecutor responded that the exception of

excited utterance applied, and the court overruled the defense's objection. Kilgore testified that Beran told him that she attempted to call 911 and that defendant took her telephone, threw it across the room, and broke the telephone.

¶ 8 Adriana Prokuski, a Joliet police officer, testified that on November 28, 2009, she was dispatched to 1104 Elizabeth Street in Joliet, Illinois for a domestic battery. After arriving at the scene, Prokuski saw that Kilgore had placed defendant in custody. Prokuski asked another officer to transport defendant to the police station, and then she spoke with Beran inside the residence approximately 15 minutes after the incident. Prokuski described Beran as "upset" and "crying, a little loud." The prosecutor asked Prokuski if Beran identified herself and provided Prokuski with information as to what "happened." Defense counsel objected on the grounds of hearsay. The prosecutor claimed the conversation also qualified as an excited utterance, and the trial court overruled the objection.

¶ 9 Prokuski testified that Beran stated that she and defendant were arguing over their son. Beran said that she was fixing her hair in order to go out. According to Beran, defendant pushed the back of the mirror, causing the mirror to hit Beran in the forehead and break. Defendant then picked up a piece of glass, approached Beran, and threatened her. Beran also told Prokuski that she saw the police at the front of the house and ran toward the front door. At that point, defendant grabbed her and threw her down on the couch.

¶ 10 According to Prokuski, she also spoke with defendant, who told Prokuski that he and Beran were arguing about "their son." Defendant told Prokuski that Beran was fixing her hair and that Beran hit the mirror with her hair straightener, causing it to break. Defendant picked up pieces of the glass, and Beran started screaming, got up from her chair, and started swinging at

defendant with a clenched fist. Defendant said that he grabbed Beran and pushed her onto the couch. Prokuski told the court that she located pieces of a broken mirror "in the garbage" in the kitchen of the residence.

¶ 11 The State rested. Defense counsel moved for a directed verdict which the trial court denied.

¶ 12 Defendant testified in his own defense and told the court that on November 28, 2009, he lived at 1104 Elizabeth in Joliet, Illinois. Defendant explained that his girlfriend, Beran, was mad because their son was not home. Defendant said that Beran was sitting on the living room couch using a mirror to do her makeup. Beran started arguing with defendant and broke the mirror after hitting it with her hair straightening iron. Defendant yelled back and started picking up the broken pieces of the mirror and putting them in the garbage can. Beran then got up from the couch, charged at him, and tried to hit defendant. Defendant grabbed her arm, and Beran swung at him with her other arm. Defendant grabbed that arm and pushed Beran onto the couch. At that point, the police started trying to kick in the front door. Following defendant's testimony, the defense rested.

¶ 13 The State called Kilgore in rebuttal who testified that he could see inside the residence through the window. He explained to the court that when he first looked inside the residence, he saw defendant walk to the back door, look out the window, and then began yelling. Beran was looking toward the back door and then ran to the front of the house in a "[f]rantic" manner. Kilgore said that Beran was approximately 10 feet from the front door when defendant came toward the front of the house. When defendant approached Beran, Kilgore did not observe Beran swing at defendant. When asked to describe defendant's contact with Beran, Kilgore testified

that he "would describe it as a bear hug type grab where he reached both arms in front of her and picked her up as she was facing outwards." He explained that Beran was facing the door at the time, and defendant was located behind her. Defendant picked up Beran, walked her over to the couch, and threw her onto the couch.

¶ 14 Following closing arguments, the court stated that the police arrived in the "midst of a domestic." The court stated that "these are the kind of occurrences sufficiently startling to produce a response." The court said that Beran did not have time to fabricate her statement in this case because the police arrived while the incident was occurring. The court found that the excited utterance exception applied. The court also found that the officer observed defendant pick up Beran, grab her and throw her on the couch. The court noted that the officer did not observe defendant picking up glass. The trial court found defendant guilty beyond a reasonable doubt of domestic battery and sentenced defendant to serve 12 months conditional discharge.

¶ 15 On April 12, 2010, defendant filed a motion for new trial claiming Beran's statements did not qualify as excited utterances, were not admissible as an exception to the hearsay rule, and the admission of the statements violated defendant's constitutional right to confront witnesses testifying against him. On April 30, 2010, the trial court denied defendant's motion for new trial. On May 3, 2010, defendant filed a timely notice of appeal.

¶ 16 ANALYSIS

¶ 17 On appeal, defendant raises two claims of error. First, defendant claims that the trial court abused its discretion by admitting Beran's statements to Prokuski because the trial court erroneously found that the statements constituted excited utterances. Second, defendant claims that the trial court violated his constitutional right to confront witnesses by admitting Beran's out-

of-court statement to Prokuski where Beran did not testify at trial, and defendant did not have a prior opportunity to cross-examine Beran.

¶ 18 I. Excited Utterance

¶ 19 Defendant argues that the trial court erred by finding Beran's statements to Prokuski to be excited utterances because approximately 15 minutes had passed since the time of the incident and that the incident was not particularly startling. The State responds that the trial court did not abuse its discretion in finding the statements to be excited utterances.

¶ 20 Evidentiary rulings are within the sound discretion of the trial court, and those rulings are given deference on appeal. *People v. Connolly*, 406 Ill. App. 3d 1022, 1026 (2011) (citing *People v. Caffey*, 205 Ill. 2d 52 (2001)). An abuse of the court's discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person could take the view adopted by the trial court. *Id.*

¶ 21 To qualify as an excited utterance exception to the hearsay rule, “there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, there must be an absence of time for the declarant to fabricate the statement, and the statement must relate to the circumstances of the occurrence.” *People v. Sutton*, 233 Ill. 2d 89, 107 (2009). The totality of the circumstances should be considered in determining whether a statement is admissible under the excited utterance exception. *People v. Williams*, 193 Ill. 2d 306, 352 (2000).

¶ 22 This court has previously found that an "event can be sufficiently startling, even in the absence of physical injury, based on the totality of the circumstances." *People v. Connolly*, 406 Ill. App. 3d at 1024 (citing *People v. Robinson*, 379 Ill.App.3d 679, 682-83 (2008)). The critical inquiry is whether the statement was made while the declarant was still affected by the

excitement of the event. *People v. Williams*, 193 Ill. 2d at 352; *People v. Connolly*, 406 Ill. App. 3d at 1024 (citing *People v. Sutton*, 233 Ill. 2d at 107). "The time factor has been described as an 'elusive' factor, 'whose significance will vary with the facts of each case.'" *People v. Williams*, 193 Ill. 2d at 353 (quoting *People v. House*, 141 Ill. 2d 323, 382 (1990)).

¶ 23 Additionally, even though a statement is made in response to an inquiry, that alone does not destroy spontaneity. *People v. Lisle*, 376 Ill. App. 3d 67, 77 (2007), *appeal denied*, 226 Ill. 2d 598 (2007). An excited utterance can still be made even after the declarant has spoken previously to another person after the event. *People v. House*, 141 Ill. 2d at 386.

¶ 24 This court has previously held that "[d]omestic violence is an intolerable offense sufficiently startling to render inoperative the normal reflective thought processes of the victim." *People v. Connolly*, 406 Ill. App. 3d at 1024. According to the testimony at trial, the police arrived while the domestic dispute was ongoing. Beran's statements to Prokuski were made within a relatively short time of the occurrence and while Beran appeared to be "upset" and "crying, a little loud." Based upon the totality of the circumstances, we conclude that the trial court acted within its discretion by admitting the statements as excited utterances. See *People v. Connolly*, 406 Ill. App. 3d at 1025-26; *People v. Robinson*, 379 Ill. App. 3d at 681-83.

¶ 25 II. Confrontation Clause

¶ 26 Defendant alternatively argues that the trial court's admission of Beran's statements violated defendant's constitutional right to confront the witnesses against him. Defendant claims that Beran's out-of-court statements were testimonial in nature, that there was no ongoing emergency and that the State failed to show that Beran was unavailable to testify or that defendant had a prior opportunity to cross-examine Beran. Defendant further argues that the

error cannot be considered harmless in this case because the error contributed to the guilty verdict, and the evidence was not overwhelming.

¶ 27 The State responds by first arguing that defendant has forfeited this issue on review because defendant did not object to the admission of Beran's statements based upon a violation of his constitutional rights at trial. It is well established that in order to preserve an error, a defendant must object at trial and then include the error in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). At trial, defense counsel objected to the admission of Beran's out-of-court statements based only upon a hearsay violation. Defense counsel did not specifically argue to the court during trial that the statements violated the confrontation clause. In his posttrial motion, defendant argued that the trial court erred by admitting the out-of-court statements because the statements constituted hearsay and violated defendant's right to confront witnesses.

¶ 28 Our supreme court has held that errors are not forfeited in cases where a defendant objects at trial based on one argument but raises another argument in a posttrial motion where the objections are “clearly close enough” or not “completely different.” See *People v. Mohr*, 228 Ill. 2d 53, 64-65 (2008); *People v. Heider*, 231 Ill. 2d 1, 14-18 (2008). Hearsay violations, in some instances, result in violations of the confrontation clause, and therefore, the issues are interrelated. See *Crawford v. Washington*, 541 U.S. 36 (2004). Therefore, we conclude that defendant has properly preserved this issue for review.

¶ 29 We now turn to the merits of defendant's argument that Beran's statements to Prokuski were testimonial in nature and the admission of these statements violated defendant's constitutional right to confront witnesses. The State argues that even if the court erred by allowing the statements into evidence, defendant was not prejudiced by the error due to the

overwhelming evidence against defendant, and therefore, defendant's conviction should be upheld. The parties agree that a claim of a constitutional violation based upon the confrontation clause presents a question of law, and we review *de novo*. *People v. Connolly*, 406 Ill. App. 3d at 1026.

¶ 30 It is well established that a testimonial, out-of-court statement by a witness who does not testify at trial is inadmissible unless the witness is unavailable to testify and defendant had a previous opportunity to cross-examine the witness. *Crawford v. Washington*, 541 U.S. at 53-54; *People v. Stechly*, 225 Ill. 2d 246, 279 (2007). In this case, the State argues that Beran's out-of-court statements to Prokuski were not testimonial in nature.

¶ 31 The United States Supreme Court has held that,

“[S]tatements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.” *Davis v. Washington*, 547 U.S. 813, 822 (2006); See *People v. Stechly*, 225 Ill. 2d at 284.

¶ 32 According to Prokuski's testimony at trial, Prokuski asked another officer to remove defendant from the scene and transport him to the police station before she spoke with Beran in the kitchen of the residence. We note Beran was not injured, and defendant was not present at

the residence but secured in police custody. Thus, there was no evidence of an ongoing emergency for Prokuski to investigate at the time Prokuski spoke to Beran. Instead, the focus of Prokuski's interview with Beran was to gather information for the purpose of investigating a suspected domestic battery. Accordingly, we conclude that Beran's statements were testimonial in nature, and therefore, the admission of the statements violated defendant's right to confront the witnesses against him due to her absence as a witness at trial.

¶ 33 However, violations of the confrontation clause do not automatically warrant reversal of a defendant's conviction. *People v. Johnson*, 116 Ill. 2d 13, 28 (1987) (citing *Lee v. Illinois*, 476 U.S. 530 (1986)); See *Delaware v. Van Arsdall*, 475 U.S. 673 (1986); *Schneble v. Florida*, 405 U.S. 427 (1972). A defendant's conviction may be affirmed if the resulting error was harmless beyond a reasonable doubt. *Delaware v. Van Arsdall*, 475 U.S. at 684; *People v. Johnson*, 116 Ill. 2d at 28. Our supreme court has held that there are three different approaches for measuring harmless error which include determining whether the error contributed to the conviction, whether the other evidence in the case overwhelmingly supported the conviction, and whether the improperly admitted evidence was merely cumulative. *People v. Stechly*, 225 Ill. 2d at 304 (citing *People v. Patterson*, 217 Ill. 2d 407, 428 (2005)).

¶ 34 In this case, the criminal complaint alleged that defendant committed the offense of domestic battery by knowingly making contact of an insulting or provoking nature with Amanda Beran, a household or family member, by grabbing Beran about the body in violation of section 12-3.2(a)(2) of the Criminal Code of 1961 (720 ILCS 5/12-3.2(a)(2) (West 2008)). The statute defines a family or household member as persons who have or allegedly have a child in common. See 720 ILCS 5/12-0.1 (West 2008).

¶ 35 At trial, the State presented testimony from officer Kilgore who personally witnessed defendant make physical contact of an insulting or provoking nature with Beran. The officer testified that he observed Beran run toward the front door of the residence in a “[f]rantic” manner” and then saw defendant grab Beran, "and pick her up and throw her onto the couch inside the living room." Upon entering the residence, Kilgore described Beran as upset and crying. Contrary to defendant’s testimony, Kilgore testified that he did not see Beran strike or swing at defendant. It was not disputed that complainant was a family member as defendant admitted to Prokuski that he and Beran were arguing about “their son,” thereby establishing that Beran was a family or household member of defendant.

¶ 36 The State’s evidence included defendant’s admissions to the officer and the officer's eye witness account of the events. Beran’s statements were duplicative of Kilgore’s observations and added nothing to this evidence against defendant. Therefore, we conclude that the trial court would have found defendant guilty of domestic battery even if the statements had been properly excluded. Accordingly, any error was harmless, and reversal of defendant’s conviction is not warranted.

¶ 37 CONCLUSION

¶ 38 The judgment of the circuit court of Will County, Illinois is affirmed.

¶ 39 Affirmed.