

2013 IL App (2d) 120573-U  
No. 2-12-0573  
Order filed February 21, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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THE PEOPLE OF THE STATE	)	Appeal from the Circuit Court
OF ILLINOIS,	)	of McHenry County.
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 11-CF-1104
	)	
ANGELO J. BIRD,	)	Honorable
	)	Joseph P. Condon,
Defendant-Appellee.	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Justices Hutchinson and Birkett concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court abused its discretion in excluding a sexual-assault victim's statements on the ground that they were not excited utterances: despite the passage of three hours and the fact that the victim was partly responding to questions, the totality of the circumstances, including the victim's physical and emotional condition, demonstrated that the victim was still affected by the excitement of the event; the questioning was insufficient to require that the statements be excluded under *Crawford*.

¶ 2 Defendant, Angelo J. Bird, was charged with aggravated criminal sexual assault (720 ILCS 5/11-1.30(a)(5) (West 2010)). The State moved *in limine* to admit evidence of statements the 93-year-old victim made before her death. The trial court denied the motion and the State appeals,

contending that the statements should have been admitted as excited utterances. We affirm in part, reverse in part, and remand.

¶ 3 Defendant was charged with sexually assaulting Irene B. Irene B. resided at Crystal Pines Rehabilitation and Health Care Center. She was 93 years old at the time of the incident and had since died.

¶ 4 The State moved to admit statements that Irene B. made to Jessica Zuniga, a nursing assistant at Crystal Pines; Samantha Casey and Roderick Cristobal, Crystal Pines employees; and Betty Eslick, the victim's daughter. The State argued that, though the statements were hearsay, they were admissible as excited utterances. The State further contended that admitting the statements would not violate defendant's right to confront witnesses.

¶ 5 The State alleged that Zuniga would testify that she walked into Irene B.'s room at 8:30 a.m. on September 25, 2011, and found her upset and crying. She was slamming her bedside table into the wall. Irene B. said that "daddy long legs came in at 5 in the morning to get her up and he scared the shit out of her." Zuniga asked who "daddy long legs" was and Irene B. replied that it was "the tall guy that got her up in the morning." Irene B. said that he "used his fingers instead of his penis." When Zuniga asked what she was talking about, she responded "for her vagina." Zuniga would testify that Irene B. continued to cry and repeat the story throughout the day.

¶ 6 The motion further alleged that Casey would testify that she responded to the victim's call light after Irene B. had made statements to Zuniga. The victim was still crying and told Casey that "daddy long legs rammed his dirty fingers into her vagina and that it hurt her."

¶ 7 The State's motion included similar statements that Irene B. made to Cristobal and Eslick. However, the State confines its argument on appeal to the statements made to Zuniga and Casey, so we need not discuss these additional statements.

¶ 8 At a hearing on the motion, defendant argued that the statements were not excited utterances, given that Irene B. had had more than three hours to fabricate them. Defendant noted that Irene B. had been diagnosed with dementia and Alzheimer's disease and that the statements to Zuniga were made in response to questioning. He further argued that, two days prior to this incident, Irene B. had been crying and claimed to have been sexually abused as a child, a statement that the defense asserted was unfounded. Finally, defendant asserted that admission of the statements would violate his right to confrontation.

¶ 9 The trial court denied the State's motion to admit the statements, finding that they were not excited utterances. The court found that Irene B. had had more than enough time to fabricate, and that the statements to Zuniga were made in response to questioning. The court noted that Irene B.'s dementia played no part in its analysis. The court did not reach the confrontation-clause issue. After the court denied a motion to reconsider, the State timely appealed.

¶ 10 The State argues that the statements were admissible as excited utterances. It contends that the trial court focused too narrowly on the time that elapsed between the exciting event and the statements and that the statements to Zuniga came in response to questions. Defendant responds that, given the amount of time the declarant had to fabricate the statements, the intervening questioning, and her dementia, the trial court properly denied admission of the statements. Alternatively, defendant asserts that the statements were inadmissible in any event because they would have violated his right to confront witnesses against him.

¶ 11 For a hearsay statement to be admissible under the excited-utterance exception, also known as the spontaneous-declaration exception, 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. Ill. R. Evid. 803(2) (eff. Jan. 1, 2011); *People v. Sutton*, 233 Ill. 2d 89, 107 (2009). Courts consider the totality of the circumstances in deciding whether a hearsay statement is admissible under the spontaneous-declaration exception. *Sutton*, 233 Ill. 2d at 107. Courts consider several factors, including time, the mental and physical condition of the declarant, the nature of the event, and the presence or absence of self-interest. *People v. Williams*, 193 Ill. 2d 306, 352 (2000) (citing *People v. House*, 141 Ill. 2d 323, 382 (1990)). The time that may pass without affecting the admissibility of a statement varies greatly. *Id.*, 193 Ill. 2d at 353. The critical inquiry is “ ‘whether the statement was made while the excitement of the event predominated.’ ” *People v. Smith*, 152 Ill. 2d 229, 260 (1992) (quoting M. Graham, Cleary & Graham’s Handbook of Illinois Evidence § 803.3, at 627 (5th ed. 1990)). Moreover, “[a]lthough a statement made in response to persistent interrogation might not be admitted under the spontaneous declaration exception [citation], the fact that a statement was made in response to a question does not necessarily destroy spontaneity.” *Williams*, 193 Ill. 2d at 353. Our review is for an abuse of discretion. *People v. Nestrock*, 316 Ill. App. 3d 1, 13 (2000).

¶ 12 Here, Irene B.’s statements to Zuniga and Casey fall within the exception. Zuniga would testify that she walked into Irene B.’s room and found her upset and crying. She was slamming her bedside table into the wall. Casey’s testimony would be similar. Thus, while the time that had passed since the incident—more than three hours—was not insignificant, Irene B. was clearly still upset by the incident. Put another way, the excitement of the event still predominated, which is the

critical inquiry. *Smith*, 152 Ill. 2d at 260. Statements made much longer than three hours after the startling event have been found admissible as excited utterances. In *People v. Gacho*, 122 Ill. 2d 221 (1988), for example, a statement made 6 1/2 hours after the occurrence was held admissible as an excited utterance where the victim spent those hours locked in a car trunk and suffering from multiple gunshot wounds and thus it was inconceivable that the declarant would have spent the intervening time trying to fabricate a story. *Id.* at 24.

¶ 13 Similarly, in *People v. DeSommer*, 2012 IL App (2d) 110663, statements that the victim's boyfriend was beating her were held admissible even though there was no evidence of when the beating occurred. The victim was found running and screaming in the street and, on closer examination, appeared "visibly disturbed and shaking." *Id.* at ¶ 19.

¶ 14 Further, Zuniga's questions did not destroy the spontaneity of Irene B.'s statements. Zuniga's questions, rather than a "persistent interrogation," were essentially kneejerk reactions to the situation, trying to find out what happened and to learn whether the patient needed assistance. That a statement is made in response to a question does not necessarily destroy spontaneity. *Williams*, 193 Ill. 2d at 353; *People v. Georgakapoulos*, 303 Ill. App. 3d 1001, 1014 (1999) (that statement was made in response to single question "what happened" did not destroy spontaneity); see also *People v. Damen*, 28 Ill. 2d 464, 470 (1963) (same).

¶ 15 Moreover, we agree with the State that, at least on this record, Irene B.'s statements are not barred by the confrontation clause. In *Crawford v. Washington*, 541 U.S. 36 (2004), the Court held that testimonial hearsay by an unavailable witness accusing the defendant of a crime was inadmissible unless the defendant had a prior opportunity to cross-examine the declarant. Because the hearsay statements at issue in that case were "testimonial under any definition" (*id.* at 61), the

Court left “for another day any effort to spell out a comprehensive definition of ‘testimonial’ ” (*id.* at 68). The Court did, however, give some guidance as to what types of statements might come within the definition of “testimonial.” “Whatever else the term covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations.” *Id.*

¶ 16 In *Davis v. Washington*, 547 U.S. 813 (2006), the Court further refined this framework, holding that statements made in response to police interrogation where the primary purpose is to enable police to provide assistance during an ongoing emergency are nontestimonial, while similar statements made when there is no ongoing emergency and the primary purpose of the investigation is to establish or prove past events are testimonial. *Id.* at 822.

¶ 17 In *People v. Stechly*, 225 Ill. 2d 246 (2007), the supreme court refused to limit the definition of “testimonial” to statements made in response to *police* questioning. *Id.* at 289 (“statements can be testimonial even if not made directly to agents of the state”). Where statements are made outside the context of police interrogation, “the only proper focus is on the declarant’s intent: Would the objective circumstances have led a reasonable person to conclude that their statement could be used against the defendant?” *Id.*

¶ 18 In *Stechly*, the court considered four statements by a five-year-old victim of sexual abuse. The court held that three statements to medical personnel, made after the victim’s mother had informed them that the victim had possibly been abused, were testimonial. The court noted that the nurses were mandated reporters of sexual abuse and that nothing indicated that the victim’s statements were for the purpose of medical treatment. *Id.* at 299-300. On the other hand, the court held the victim’s statements to her mother admissible. The mother’s question, “What happened?,”

was intended only to discern whether her child had been injured; nothing in the record suggested that the mother would have had any hint that the response would suggest a criminal act. *Id.* at 301; see also *People v. Learn*, 396 Ill. App. 3d 891, 903 (2009).

¶ 19 Irene B.'s statements are more like the statements to the mother in *Stechly*. Zuniga walked into Irene B.'s room and found her upset and crying, and asked her what happened. Her questions were likely intended to see whether the victim needed medical treatment or some other service, and she had no reason to suspect that a crime had been committed. Casey, meanwhile, asked no questions at all. Thus, at least on the present record, *Crawford* does not bar admission of the statements to Zuniga and Casey.

¶ 20 The order of the circuit court of McHenry County is affirmed in part and reversed in part, and the cause is remanded.

¶ 21 Affirmed in part and reversed in part; cause remanded.