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2013 IL App (3d) 110554-U

Order filed April 2, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
THIRD DISTRICT

A.D., 2013

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 21st Judicial Circuit,
Plaintiff-Appellee,	)	Kankakee County, Illinois,
	)	
v.	)	Appeal No. 3-11-0554
	)	Circuit No. 10-CF-294
SHANIAN D. RYE,	)	
	)	Honorable
Defendant-Appellant.	)	Clark E. Erickson,
	)	Judge, Presiding.

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JUSTICE LYTTON delivered the judgment of the court.  
Justices Carter and McDade concurred in the judgment.

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**ORDER**

- ¶ 1 *Held:* The trial court did not abuse its discretion when it admitted a witness' statements as excited utterances.
- ¶ 2 Defendant, Shanian D. Rye, was convicted of first degree murder (720 ILCS 5/9-1(a)(2) (West 2010)) and sentenced to 28 years' imprisonment. Defendant appeals, arguing that the trial court abused its discretion by admitting a witness' statements to a police officer under the excited utterance exception to the hearsay rule. We affirm.

¶ 3

## FACTS

¶ 4 On June 25, 2010, defendant was charged with two alternate counts of first degree murder. 720 ILCS 5/9-1(a)(1), (2) (West 2010). The indictment alleged that on June 10, 2010, defendant, without legal justification, cut Jonathan Themer about the stomach with a sharp object, causing Themer's death.

¶ 5 At defendant's bench trial, Derrick Tomsic testified that on the night of the offense, he, Themer, and Terry Davidson went to a bar. After leaving the bar, they encountered Dustin Keller, who was driving a white Pontiac Sunfire. Defendant was riding in the passenger seat. Tomsic told Keller they were going to get cocaine, and Keller said he was doing the same. Tomsic, Themer, and Davidson then got into the car. Tomsic later heard Themer mention something about a cigarette and then saw him reach around the seat to punch and choke defendant. Keller stopped the car, and Tomsic and Davidson got out and pulled Themer off of defendant. Keller and defendant then drove away.

¶ 6 Tomsic further testified that the Sunfire returned and a metal object was thrown out of the car as it drove by. When the car returned again, defendant got out and began to fight with Themer. Tomsic saw Themer punch defendant, and defendant made an upward stabbing motion toward Themer's abdomen. Davidson ran over and hit defendant. Tomsic then saw Themer fall to the ground, and defendant ran to the car. Tomsic immediately called 911 because Themer's intestines were outside of his stomach.

¶ 7 Davidson testified that he went to a bar with Themer and Tomsic on the night of the offense. On the way home, they went to a party, where he saw Keller and defendant pull up in a Sunfire. Keller told Tomsic he wanted to buy some cocaine, and Davidson, Tomsic, and Themer got into

Keller's car. Davidson testified that defendant flicked a cigarette out the window, hitting Themer in the face, and Themer began to choke defendant. Keller stopped the car, and Davidson and Tomsic got out to pull Themer off of defendant. Keller and defendant drove off.

¶ 8 Davidson testified that as he, Tomsic, and Themer began to walk, the Sunfire returned and something that sounded like metal was thrown out of the car. The car returned again, and this time, defendant got out and ran toward Tomsic and Themer. Themer grabbed defendant around the neck, and defendant made swinging motions toward Themer's stomach. Davidson ran over and punched defendant in the face. Defendant fell down, but eventually stood up and got into the car. As the Sunfire drove off, Davidson and Themer took a few steps, and Themer fell to the ground. Davidson could see that Themer's intestines were outside of his stomach. Tomsic called 911, and Davidson used his shirt to hold Themer's intestines in.

¶ 9 Police Sergeant Tim Kreissler testified that he responded to the call regarding a stabbing victim. Upon arriving at the scene, Kreissler found Davidson and Tomsic crouched over Themer, who was lying on the ground. Both Davidson and Tomsic were hysterical and screamed that Themer had been cut. Kreissler testified that the ambulance was at the scene for only two or three minutes before taking Themer to the hospital. Kreissler testified that he spoke with Davidson soon after the ambulance left. Kreissler testified that Davidson was still shaking, distraught, and crying, and he demanded a cigarette. Davidson sat in the back of a squad car with the door open and smoked the cigarette. Kreissler asked Davidson what happened.

¶ 10 Defendant objected to allowing Kreissler to testify about Davidson's statements because they were hearsay. The trial court overruled the objection and admitted Davidson's statements under the excited utterance exception to hearsay. Kreissler went on to testify that Davidson told him that he,

Tomsic, and Themer had been at a bar, where they got into a scuffle and then left. While walking, the two men that they got into the scuffle with drove past them in a white car. Davidson told him that when the car returned, defendant got out and walked up to Themer, who had beaten up defendant earlier that night. Defendant swung something at Themer and cut him in the stomach. Kreissler also testified that a tire iron was found near the scene of the stabbing.

¶ 11 Keller testified that on the night of the incident, he was driving with defendant when he saw Tomsic, Davidson, and Themer. Keller offered all three men a ride. In the car, Themer asked Keller for a cigarette, and Keller declined because he only had one left. Themer asked defendant for a drag off of his cigarette. Defendant told Themer there was nothing left and threw the cigarette out the window. Keller testified that Themer started choking defendant. When Keller stopped the car, Themer, and eventually Davidson and Tomsic, began attacking defendant. Defendant managed to get back in the car and drove off with Keller. Keller testified that he and defendant did not return to the scene and did not throw a tire iron out of the vehicle.

¶ 12 Defendant testified on his own behalf. His testimony was similar to Keller's with regard to picking up Tomsic and his friends and getting into an altercation with Themer in the car. Defendant testified that after Keller stopped the car, he and Tomsic exchanged punches. Themer eventually attacked defendant and knocked him to the ground. Defendant testified that he felt Themer's hand grab a 3½-inch knife that defendant carried on the outside of his pocket. Defendant backed away as Themer held the knife. Defendant jumped toward Themer and grabbed the blade with one hand while using his other hand to punch Themer's hand. Defendant took the knife and pushed it toward Themer's stomach as defendant tried to get away. As Themer punched defendant, someone hit defendant from the side, and the knife went back into Themer. Defendant ran toward Keller's car.

Defendant testified that he and Keller drove away and did not return. Defendant also denied throwing a tire iron out of the car.

¶ 13 The trial court found defendant guilty of first degree murder. Defendant filed a motion for a new trial, which the trial court denied. The court then sentenced defendant to 28 years' imprisonment. Defendant appeals.

¶ 14 ANALYSIS

¶ 15 Defendant argues that the trial court abused its discretion by admitting Davidson's statements to Kreissler concerning the incident under the excited utterance exception to the hearsay rule.

¶ 16 For a statement to be admissible under the excited utterance, or spontaneous declaration, exception, there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, an absence of time for the declarant to fabricate a statement, and a statement relating to the circumstances of the occurrence. Ill. R. Evid. 803(2) (eff. Jan. 1, 2011); *People v. Sutton*, 233 Ill. 2d 89 (2009). Courts look to the totality of the circumstances to determine whether a statement is admissible under the excited utterance exception. *Sutton*, 233 Ill. 2d 89. Courts consider several factors, including the passage of time between the event and the statement, the declarant's mental and physical condition, the nature of the event itself, and whether the statement is in the declarant's self-interest. *Id.*

¶ 17 Whether a statement is admissible as an excited utterance is within the sound discretion of the trial court, and that decision will not be overturned absent an abuse of that discretion. *People v. Connolly*, 406 Ill. App. 3d 1022 (2011). A court abuses its discretion only when its decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court. *Id.*

¶ 18 The totality of the circumstances in this case supports the trial court's decision to admit Davidson's statements as excited utterances. See *Sutton*, 233 Ill. 2d 89. Here, Kreissler encountered Davidson assisting his friend, who had been fatally stabbed in the stomach. An ambulance arrived and quickly took Themer to the hospital. While still at the scene, defendant, who was shaking, distraught, and crying, made his statements to Kreissler.

¶ 19 Defendant argues, however, that Davidson's statements were not spontaneous because they were too detailed and there was ample time for Davidson to reflect on the events and fabricate his statements. While the amount of time that may pass without affecting the admissibility of a statement varies greatly, the critical inquiry with regard to time is whether the statement was made while the excitement of the event predominated. *Sutton*, 233 Ill. 2d 89. Although the record is silent as to the exact amount of time which passed between the stabbing and Davidson's statements, it would be reasonable to conclude that it was a short time span based on Kreissler's testimony that the ambulance took Themer to the hospital minutes after it arrived, and Davidson, who was still at the scene, gave the statements shortly after the ambulance left. We believe that based on the nature of the event and the fact that Davidson's attention was likely focused on saving his friend's life, his statements were made while he was still under the shock of the event and had no time to reflect or the presence of mind to fabricate his statement. See *People v. Stiff*, 391 Ill. App. 3d 494 (2009) (holding that it is unlikely that the victim fabricated his statement, despite the unknown amount of time between incident and the statement, where the magnitude of the victim's injuries commanded his full attention). Moreover, Kreissler testified that Davidson was visibly distraught when he gave his statement at the scene. See *People v. Gwinn*, 366 Ill. App. 3d 501 (2006) (holding that the excitement of the event predominated when victim gave a statement 15 minutes later and was crying,

trembling, and visibly shaken).

¶ 20 We also reject defendant's contention that Davidson's statements were not spontaneous because they were made in response to a question posed by Kreissler. The fact that a statement is made in response to an inquiry does not destroy spontaneity. *People v. Williams*, 193 Ill. 2d 306 (2000). Kreissler's brief question to Davidson had little effect on the spontaneity of Davidson's statements. See *Sutton*, 233 Ill. 2d 89 (holding that statements made in response to a police officer's questions 20 minutes after the crime had occurred did not destroy the statements' spontaneity). Additionally, we do not agree with defendant that Davidson's statements were self-serving. Davidson's failure to recount every incriminating detail was not the same as fabricating a story for his own self-interest where it was undisputed that defendant stabbed Themer, and Davidson was not implicated in the murder. Therefore, we hold that the trial court did not abuse its discretion in admitting Davidson's statement as an excited utterance.

¶ 21

#### CONCLUSION

¶ 22 The judgment of the circuit court of Kankakee County is affirmed.

¶ 23 Affirmed.