2015 IL App (1st) 131578-U

THIRD DIVISION
January 28, 2015

No. 1-13-1578

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 DV 78750
	)	
PAUL RIVERS,	)	Honorable
	)	Caroline Kate Moreland,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HYMAN delivered the judgment of the court.
Presiding Justice Pucinski and Justice Mason concurred in the judgment.

ORDER

¶ 1 ***Held:*** Judgment entered on domestic battery conviction affirmed over defendant's claim that the court erred in allowing into evidence certain statements as excited utterances; mittimus modified.

¶ 2 After a bench trial, defendant Paul Rivers was found guilty of domestic battery and battery. The court merged these convictions and sentenced Rivers to 90 days' imprisonment for domestic battery. On appeal, Rivers contends that the circuit court committed reversible error in allowing two hearsay statements into evidence as excited utterances, specifically, that the victim and Rivers were fighting because she pays for the cable boxes and he keeps breaking them, and that he urinated on the bed because she would not have sex with him. Rivers also contends that

even if the statements are excited utterances, neither statement has any relevance to the issues and admitting them was harmful and prejudicial. We disagree. Under Ill. R. Evid. 803 (2) (eff. Jan. 1, 2011), the statements fully satisfy the criteria for excited utterance.

¶ 3 In addition, Rivers argues, and the State concedes, that the mittimus should be corrected under the one-act, one-crime doctrine to reflect only one conviction for domestic battery, and we agree.

¶ 4 Background

¶ 5 The victim and Rivers, the father of her two children, had recently been engaged after being together five years. At trial, the victim said she loves Rivers, and her testimony differed considerably from that of two police officers who saw Rivers punch her several times. On November 2, 2012, at 2 a.m., according to the testimony of officers Doyle and Diblasi, they responded to a battery report and on reaching the front door of the house, heard yelling inside, and knocked on the door. An elderly woman immediately opened it, and told them that "they" were fighting in the back. The officers saw the victim lying on the stairwell, face up, with Rivers straddling her as he punched her four times in the face. The officers pulled Rivers off and Officer Diblasi took Rivers into custody. Officer Doyle accompanied the victim upstairs to retrieve some belongings.

¶ 6 Officer Doyle reported that the victim was frazzled, distraught, and crying and shaking, and had swelling around her left eye.

¶ 7 As Officer Doyle was about to testify about a conversation she had with the victim while they were upstairs, Rivers objected on relevance and hearsay grounds. The conversation took place less than five minutes after the officer first saw Rivers striking the victim. The trial court allowed the testimony under the excited utterance exception to hearsay. Officer Doyle then

testified that when she asked the victim what they were fighting about, the victim told her that they were fighting over the cable box which she pays for and he keeps breaking. Officer Doyle also said the victim told her that Rivers urinated on the bed because the victim would not have sex with him. The victim signed a complaint against Rivers, but refused medical attention.

¶ 8 The defense called the victim, who testified that in November 2012, she was staying with Rivers's grandmother and Rivers, who was on parole and under house arrest. In the early morning hours of November 2, she and Rivers started arguing and she wanted to leave the house but Rivers refused to let her go. In anger, Rivers "stomped" the cable box. The victim then twice unplugged Rivers's monitoring box. She then decided that she did not want to leave, but wanted to stay and argue with Rivers. She was angry with him, and as she went upstairs, she grabbed Rivers by the neck. She had been drinking and was tipsy, however, and fell back on the stairs. As Rivers was attempting to pull her off of him, police arrived. She was not screaming, and was upset that she had argued with Rivers. One officer took Rivers and the other accompanied the victim to her bedroom. There, the officer checked the victim for bruises, but there were none. She acknowledged signing "something," in blank, because she did not know what was going on, and did not want Rivers to go to jail. Rivers was her sole means of support for raising their children.

¶ 9 The victim denied telling Officer Doyle that Rivers urinated on her bed because she would not have sex with him. The victim testified that she told the officer that she had done so while arguing with Rivers because he would not let her leave the room. The victim explained that this occurred before Rivers stomping on the cable box and her unplugging his house arrest monitoring box. When police arrived, they had been arguing for an hour. The victim denied that Rivers punched her and she had refused medical attention because she was not bruised. Rivers

was her sole means of support for raising their children. Rivers's grandmother also testified and her version of the events generally supported the victim's story.

¶ 10 The trial judge found Rivers guilty of domestic battery and battery. In doing so, the court found the officers' testimony credible and the victim's testimony incredible. The court also found that the victim's testimony did not make sense, and noted that the grandmother did not see anything in the stairwell.

¶ 11 Rivers filed a motion for a new trial. He alleged, in relevant part, that the victim's statements to Officer Doyle did not qualify as excited utterances, were not relevant to the issues, and should not have been admitted. The court denied Rivers's motion, finding that the victim's statements to the officer satisfied the requirements of an excited utterance as they explained why the couple was fighting, and the State laid a proper foundation for them.

¶ 12 Analysis

¶ 13 On appeal, Rivers contends that the court committed reversible error in allowing into evidence the victim's statements to Officer Doyle, *i.e.*, that they were fighting because she pays for the cable boxes and he keeps breaking them, and that Rivers urinated on the bed because the victim would not have sex with him. Rivers maintains that the statements do not qualify as excited utterances. And, even if the trial court did not err, the statements are irrelevant to the issues and prejudicial, entirely lacking in probative value.

¶ 14 Hearsay, as has been repeated to death in case law, involves an out-of-court statement offered to prove the truth of the matter asserted. *People v. Peoples*, 377 Ill. App. 3d 978, 983 (2007). For a statement to qualify as an excited utterance, (i) the occurrence must be sufficiently startling or at least stressful enough to produce a spontaneous and unreflected statement, (ii) the declarant must still be under the stress or excitement of the circumstances so as to eliminate the

possibility of premeditation or fabrication, and (iii) the statement must relate to the circumstances of the occurrence. See Ill. R. Evid. 803 (2) (eff. Jan. 1, 2011); *People v. Sutton*, 233 Ill. 2d 89, 107 (2009). Our inquiry considers the totality of the circumstances, which incudes time, the declarant's mental and physical condition, the nature of the event, and the presence or absence of self-interest. See *People v. Williams*, 193 Ill. 2d. 306, 352 (2000), quoting *People v. House*, 141 Ill. 2d 323, 382 (1990). "The admission of evidence is within the sound discretion of a trial court, and a reviewing court will not reverse the trial court absent a showing of an abuse of that discretion." *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

¶ 15 As to the length of time separating the event from the utterance, the decisive question is whether the declarant made the statement while still experiencing the trauma of the startling event. See *People v. Connolly*, 406 Ill. App. 3d 1022, 1025 (2011). The testimony established that when the police arrived, they saw Rivers punching the victim as she was lying in a stairwell. Officer Doyle, who accompanied the victim to the bedroom after the incident, testified that the victim was visibly shaken, injured, and made the statements within five minutes of being punched by Rivers. Thus, the victim remained emotionally upset. *Connolly*, 406 Ill. App. 3d at 1026. Considering her mental condition, the victim had no time to reflect or contrive or misrepresent. Moreover, that the victim's statements came after the officer inquired as to why they were fighting did not destroy the spontaneity of the circumstances surrounding the fight, considering the officer's description of the victim's frame of mind when she was responding. After considering the totality of the circumstances, we find no abuse of discretion in the conclusion that these statements constituted excited utterances under Rule 802(2). *Connolly*, 406 Ill. App. 3d at 1025-26.

¶ 16 Rivers, nonetheless, contends that the statements suggested evidence of prior

bad acts, in particular, that he had a propensity to abuse the victim and was a bad person deserving of punishment, a purpose for which the statements were not admissible. He further contends that the statements were irrelevant to the central issue of whether there was bodily harm, and their prejudice outweighed any probative value.

¶ 17 In his post-trial motion, for the first time, Rivers maintained that the statements could be considered evidence of a different prior bad act, and had been introduced only to prejudice the court against him and convince the court that he was a bad person deserving of punishment. Rivers did not object on this specific basis at trial, and, therefore, failed to preserve it on appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). He also has not argued plain error on appeal, and has thus forfeited appellate review. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010). That said, the victim's statements concerned why Rivers and the victim were fighting, and were thus admissible as part of a continuing narrative giving rise to the offense (*People v. Patterson*, 2013 IL App (4th) 120287, ¶ 58), and the evidence against him was overwhelming. *Id.* at ¶ 61.

¶ 18 One Act, One Crime Doctrine

¶ 19 Finally, Rivers contends that his simple battery conviction should be vacated in violation of the one-act, one-crime doctrine. We observe that the mittimus indicates that Rivers was convicted of battery and domestic battery and sentenced to concurrent terms of 90 days' imprisonment. The mittimus, however, further reflects that the battery conviction merged into the domestic battery offense. To prevent any confusion, we modify the mittimus to reflect one conviction for domestic battery with a sentence of 90 days' imprisonment. Ill. S. Ct. R. 615 (eff. Oct. 1, 2014); *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995).

¶ 20 We affirm the judgment and modify the mittimus as indicated.

¶ 21 Affirmed; mittimus modified.