2015 IL App (4th) 130999-U

NO. 4-13-0999

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED
September 9, 2015
Carla Bender
4th District Appellate
Court, IL

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
Plaintiff-Appellee,	)	Circuit Court of
v.	)	Vermilion County
ANTWANNE HALL,	)	No. 12CF599
Defendant-Appellant.	)	
	)	Honorable
	)	Craig H. DeArmond,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Justices Harris and Steigmann concurred in the judgment.

ORDER

¶ 1 *Held*: (1) Where the totality of the circumstances indicated the victim had sufficient time and opportunity to reflect on the startling event before speaking with the police, the victim's statements lacked spontaneity, and thus, did not qualify under the excited-utterance exception to the hearsay rule.

¶ 2 (2) The victim's statements to the police were testimonial in nature, and therefore, the admission of those statements into evidence without defendant's opportunity to cross-examine the victim violated defendant's constitutional right of confrontation.

¶ 3 In September 2013, a jury found defendant, Antwanne Hall, guilty of aggravated battery with a firearm and aggravated discharge of a firearm. In October 2013, the trial court sentenced defendant to prison. On appeal, he argues (1) he was denied a fair trial, (2) his aggravated-discharge-of-a-firearm conviction must be vacated under the one-act, one-crime rule, and (3) the court relied upon the incorrect sentencing range. We reverse defendant's convictions and remand for a new trial.

¶ 4 I. BACKGROUND

¶ 5 In December 2012, the State charged defendant with (1) aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2010)) (count I), (2) attempt (armed robbery) (720 ILCS 5/18-2 (West 2010)) (count II); and (3) aggravated discharge of a firearm (720 ILCS 5/24-1.2(a)(2) (West 2010)) (count III). The charges stemmed from a reported incident where the victim, Danny Bryant, was approached by defendant and was told to get out of Fair Oaks, a housing complex. Defendant then pointed a gun at Bryant and told him to empty everything from his pockets. Bryant pulled out cash from his pocket, but then he put it back into his pocket. Defendant shot Bryant in the leg.

¶ 6 Defendant's jury trial began on September 10, 2013. Jaron Smalls testified, on December 16, 2012, he, Bryant, Malcolm Anderson, and Christopher Smalls went to the motorcycle club The Untouchables, where they stayed from 10 p.m. until 2 a.m. After leaving the club, they attended a party in the Fair Oaks complex. They left the party on foot and began walking to their vehicle. According to Smalls, a suspect approached Bryant, "letting him know that he wasn't supposed to be out there." The suspect was accompanied by approximately 10 individuals and had been following Smalls and his group to their vehicle. The suspect kept his hand on his waist, as if he was reaching for something. Sometime before they got to the vehicle, the suspect pulled out a handgun. The prosecutor asked Smalls if anything happened as they got closer to the vehicle. Smalls said: "I guess they was having a discussion about trying to grab him for some money." He said he did not hear the conversation because he was already in the vehicle. Smalls said he called the police from the vehicle. Smalls said the suspect pointed a gun at Bryant, then shot at Bryant five to seven times. After he was shot, Bryant ran from the area. Smalls said they found Bryant a block away and began to drive him to the hospital. Because the

tire had been shot, they were stopped with a flat. An ambulance arrived and took Bryant to the hospital. He had been shot once in the leg. Smalls said he and Christopher spoke with the police officers when they arrived on the scene, which, he thought, was probably five to eight minutes after the shooting. Anderson had gotten out of the vehicle when they stopped to pick up Bryant.

¶ 7 Smalls said he had known defendant for "no longer than a year" before the shooting. He said Bryant's brothers were in a gang called "Don't Trust Nobody" and defendant was in a gang called "Rude Boys" or "So Icy." The two gangs were rivals.

¶ 8 Danville police officer Michael Stephens testified he responded to Fair Oaks and spoke with witnesses. He conducted a preliminary investigation at the scene. Approximately 30 minutes to an hour after receiving the call, he went to the emergency room and spoke with Bryant. At this point in Stephens' testimony, the prosecutor asked the trial court to allow the admission of the anticipated testimony of Bryant's statements to Stephens as excited utterances. The court reserved ruling.

¶ 9 Stephens testified he and Commander Jane McFadden interviewed Bryant at the hospital. Bryant told the officers that "Twan" (defendant) had shot him in the leg. He said he could identify him if he saw a photograph. Bryant described "Twan" as being from Chicago, a member of the So Icy gang, dark-skinned, with short braided hair and "buck teeth." Bryant said the shooting occurred because defendant "has a problem with his two brothers." Bryant had been with Jaron and Christopher Smalls at a party in Fair Oaks prior to the shooting. They saw defendant at the party as well. When defendant approached Bryant later, on the way to the vehicle, Bryant said defendant "told him he needed to get out of [t]here because [he] and Icy Gang believe they run Fair Oaks." Bryant's brothers are members of the rival "DTN" gang. According to Stephens, Bryant said defendant pulled a handgun and pointed it at Bryant's face,

telling him to empty his pockets. Bryant pulled out a $5 bill from his pocket and then tucked it back in. Defendant fired five to seven shots at Bryant's legs. Bryant ran away but was hit once in his right leg.

¶ 10 McFadden testified she responded to the hospital in reference to a gunshot victim. She met Stephens and together they spoke with Bryant. Bryant seemed to be in "serious pain" from the wound to his leg. McFadden said she took photographs of the injury. She also said Stephens interviewed Bryant, while she interjected a few questions. The following exchange occurred:

> "MR. MOCKBEE [(Assistant State's Attorney)]: And, Judge, this point I'm going to ask a question regarding what Mr. Bryant said.
>
> THE COURT: Ms. Morris [(defense attorney)].
>
> MS. MORRIS: Your Honor, we would be objecting, the same grounds as previously.
>
> THE COURT: That objection is overruled. It's an exception to the hearsay rule as an excited utterance."

The prosecutor asked McFadden what Bryant told Stephens. She said:

> "A. He said he was at a party in Fair Oaks, I believe it was at 910 Redden. He had been there with several other subjects. They saw a subject he knew to be named Twan and that he left the party, nothing, you know, out of the ordinary occurred. They went over to another house to get some alcohol, then they left there and

they were confronted—he was confronted by Twan in the parking lot on the way back to Christopher Smalls' car.

Q. Did he say anything about who Twan was?

A. He didn't know his last name. He just knew he was from Chicago and part of the So Icy Gang. He just described him to us. He didn't have a last name.

Q. Did *** Bryant describe what Twan did?

A. Yes, sir.

Q. And what did that—what did [Bryant] say?

A. He said he stopped him and told him he didn't belong there he said because *** [his] brothers Tevin and Kevin are part of the DTN gang and Twan's part of the So Icy gang, and So Icy thinks they run Fair Oaks so they told me that I needed to leave. And at that point [Bryant] said that—he had told him, hey, I don't want any problems. I'm gonna leave. And then he said at that point Twan pulled a handgun, aimed it at his head, they were about five—maybe five feet apart I think he said, and told him to empty his pockets.

Q. And what did—happened next according to [Bryant]?

A. Well, [Bryant] said [']I pulled out a $5 bill and told him it—I don't have anything.' He stuck the $5 bill back in his pocket. He said at that point Twan started shooting at him. He did notice

that he lowered the gun though and tried to hit him in the legs, that's where he was shot."

Bryant explained to the officers he ran from the area, around the corner, where Christopher and Jaron Smalls picked him up in the vehicle.

¶ 11 On cross-examination, McFadden said she did not recall Bryant mentioning a crowd chasing him prior to the shooting. McFadden said she had met Stephens at the hospital around 4:30 a.m.

¶ 12 The State next called Danville police officer Danielle Lewallen. She said she responded to the area where Smalls' vehicle had stopped due to a flat tire, arriving approximately 15 minutes after the shots-fired dispatch. Lewallen arrived after the ambulance. She asked Jaron and Christopher Smalls about the shooting. She documented their statements in her report. She took pictures of the vehicle's license plate, the flat tire, and the bullet holes in the side.

¶ 13 At the conclusion of Lewallen's testimony, the State rested and defendant presented no evidence. After deliberations, the jury returned a not guilty verdict on the attempt (armed robbery) charge, and guilty verdicts on the aggravated-battery-with-a-firearm and aggravated-discharge-of-a-firearm charges.

¶ 14 Defendant filed a motion for a new trial, which the trial court considered at a hearing on October 21, 2013. Defendant raised the issues he raises in this appeal, namely (1) his sixth-amendment right to confront witnesses against him was violated when Bryant's statements, allegedly made to the police, were admitted into evidence as excited utterances as an exception to the hearsay rule; and (2) the one-act, one-crime rule prohibited the entry of two convictions for what he argued was one physical act. After considering arguments of counsel, the court denied defendant's motion and proceeded to sentencing.

¶ 15 No evidence was presented at the sentencing hearing. After considering recommendations of counsel, the trial court sentenced defendant, noting the potential range of punishment was 21 to 45 years in prison, to 27 years in prison on the aggravated-battery-with-a-firearm charge, to run concurrently with a sentence of 15 years in prison on the aggravated-discharge-of-a-firearm charge. The court denied defendant's motion to reconsider his sentence.

¶ 16 This appeal followed.

¶ 17 II. ANALYSIS

¶ 18 A. Excited Utterances

¶ 19 First, defendant claims he was denied his right to a fair trial when the trial court admitted Bryant's hearsay statements as excited utterances. The court allowed Officers Stephens and McFadden to testify at trial as to Bryant's statements regarding the specific circumstances of the shooting, the identification of defendant as the shooter, and a possible motive for the confrontation. The court found Bryant made these statements in the course of the "sufficiently startling or exciting event" of being shot. Defendant argues these statements were the result of police questioning and made well after the heightened emotions from the shooting had quelled. We agree with defendant.

¶ 20 To qualify as an excited utterance, an exception to generally prohibited hearsay, there must be (1) a sufficiently startling event that produces a spontaneous and unreflecting statement, (2) an absence of time for the declarant to fabricate the statement, and (3) a direct relationship between the statement and the circumstances of the event. *People v. Sutton*, 233 Ill. 2d 89, 107 (2009). Factors to be considered include the "time, the mental and physical condition of the declarant, the nature of the event, and the presence or absence of self-interest." *Sutton*,

233 Ill. 2d at 107. However, no single factor is determinative, as the courts must look at the totality of the circumstances. *Sutton*, 233 Ill. 2d at 107.

¶ 21 Here, the trial court seemed to rely on the time factor. The court stated: "I find that the amount of time between the event and the time of the statements is not so substantial as to destroy the spontaneity of the statements." The court noted, within five to eight minutes of Bryant being shot, Stephens was able to speak him at the vehicle and then again, immediately following, at the hospital. (Our review of the record indicates Stephens did not speak with Bryant at the vehicle, but did so first at the hospital.)

¶ 22 Although the time factor is elusive, in that no defined time is necessarily required, the " 'critical inquiry' " centers on whether the declarant was still affected by the excitement of the event at the time he made the statement. *People v. Burney*, 2011 IL App (4th) 100343, ¶ 39. " '[A]n excited utterance can still be made even after having spoken previously to another after the event.' " *Burney*, 2011 IL App (4th) 100343, ¶ 39 (quoting *People v. Connolly*, 406 Ill. App. 3d 1022, 1026 (2011)). The period of time that may pass without affecting the spontaneity of the statement varies greatly. *People v. Lisle*, 376 Ill. App. 3d 67, 78 (2007). In one case, the statement made 6 1/2 hours after the occurrence was held admissible (*People v. Gacho*, 122 Ill. 2d 221, 240-42 (1988)), while in another, the statement made only 20 minutes after was excluded (*People v. Newell*, 135 Ill. App. 3d 417, 426 (1985)). See *Lisle*, 376 Ill. App. 3d at 78. The pivotal inquiry is whether the "excitement of the event predominated." *Lisle*, 376 Ill. App. 3d at 78 (Internal quotation marks omitted.) (quoting *People v. Williams*, 193 Ill. 2d 306, 353 (2000)).

¶ 23 We review a trial court's evidentiary ruling under an abuse-of-discretion standard. *Burney*, 2011 IL App (4th) 100343, ¶ 40. That is, we will only reverse if the court's ruling was

"arbitrary, fanciful, unreasonable or where no reasonable person would take the view adopted by the trial court." (Internal quotation marks omitted.) *Burney*, 2011 IL App (4th) 100343, ¶ 40.

¶ 24 Given this deferential standard, we must closely examine and consider the relevant case law in light of the specific facts of this case. Our review of the testimony leads us to conclude the statements were not spontaneous declarations.

¶ 25 The explanation for allowing the admission of an excited utterance can best be described as follows:

> " 'A spontaneous exclamation may be defined as a statement or exclamation made immediately after some exciting occasion by a participant or spectator and asserting the circumstances of that occasion as it is observed by him. The admissibility of such exclamation is based on our experience that, under certain external circumstances of physical or mental shock, a stress of nervous excitement may be produced in a spectator which stills the reflective faculties and removes their control, so that the utterance which then occurs is a spontaneous and sincere response to the actual sensations and perceptions already produced by the external shock. Since this utterance is made under the immediate and uncontrolled domination of the senses, rather than reason and reflection, and during the brief period when consideration of self-interest could not have been fully brought to bear, the utterance may be taken as expressing the real belief of the speaker as to the

facts just observed by him.' " *People v. Damen*, 28 Ill. 2d 464, 471 (1963) (quoting *Keefe v. State*, 72 P.2d 425, 427 (Ariz. 1937)).

¶ 26 Here, the statements at issue are those made by Bryant, as testified to by Officers Stephens and McFadden. First, according to Stephens, the conversation with Bryant at the hospital included these topics: (1) Stephens asked Bryant if he wanted to discuss the case and Bryant said he did; (2) Bryant named "Twan" as the shooter; (3) Bryant said he could identify "Twan" if he saw a photograph of him; (4) Bryant described the physical features of "Twan"; (5) Bryant said "Twan" was a member of the So Icy gang; (6) Bryant described the gun used; (7) Bryant offered a motive, stating "Twan" had "a problem" with Bryant's brothers; (8) Bryant described where he was and who he was with prior to the shooting; (9) Bryant described what had occurred at the party earlier that night; (10) Bryant described the encounter with "Twan" as he walked toward the vehicle; (11) Bryant explained the gang affiliation of his brothers; (12) Bryant explained he had told others earlier in the day that he did not want to confront "Twan" that evening; and (13) Bryant described details of the moments after "Twan" displayed the gun. Bryant's responses and descriptions were revealed only upon the questions posed by Stephens and McFadden. A review of Stephens' testimony indicated the urgency or spontaneity of Bryant's statements was lacking. The exchange had the appearance of a police investigatory interview with the victim, where the victim voluntarily agreed to provide police with details regarding the shooting to further the investigation. There was no indication the interview was conducted while Bryant was in shock, upset, or stressed from the event.

¶ 27 McFadden's testimony provided further support that the nature of the meeting with Bryant was a seemingly calm investigatory interview. The prosecutor asked McFadden if she spoke with Bryant. She replied: "Yes. Officer Stephens was interviewing him and I had

interjected a couple of questions at the same time." Although she described Bryant as "sweating pretty profusely" and in "serious pain," as evidence by his tendency to "exhale loudly," she did not say he appeared stressed, upset, or nervous from the incident.

¶ 28 Stephens and McFadden reportedly spoke with defendant 30 minutes to one hour after the shooting. However, the relatively short amount of time between the shooting and their conversation in the hospital does not control in this case. Instead, we find the nature of the conversation and the lack of spontaneity as the dispositive factors. Based upon the testimony presented at trial, Bryant had sufficient time to reflect on what happened before he agreed to speak with Stephens and McFadden. His responses were not made with urgency or within the immediacy of the startling event. Rather, he responded to successive investigatory questions from the officers.

¶ 29 Because the officers' conversations with Bryant consisted of a series of questions, it is clear the officers were gathering investigatory details and Bryant was providing those details, which he arguably would have had time to fabricate. Bryant had sufficient time and opportunity to reflect on the shooting incident. We find his statements were not made with the required spontaneity, immediacy, urgency, shock, stress, or excitement of the event, and they were not made under the " 'immediate and uncontrolled domination of the senses.' " See *Damen*, 28 Ill. 2d at 471 (quoting *Keefe*, 72 P.2d at 427). " 'While the amount of time necessary for fabrication may vary greatly, the critical inquiry with regard to time is whether the statement was made while the declarant was still affected by the excitement of the event.' " *Burney*, 2011 IL App (4th) 100343, ¶ 39 (quoting *Connolly*, 406 Ill. App. 3d at 1025). We cannot say the excitement of the event predominated Bryant's senses at the time he responded to the officers' questions. *Cf. Lisle*, 376 Ill. App. 3d at 78 (when the shooting victim appeared at the witness's

home asking for help, the victim's statements to the witness, including the identification of the shooter, were admissible under the excited utterance exception). McFadden described Bryant as being presumably in pain but she did not report that he was visibly upset, shaking, nervous, or in shock. As such, the lack of spontaneity of Bryant's statements, judged in light of the totality of the circumstances, including the nature of the questioning by the officers and the opportunity Bryant had to reflect on the situation, establishes that the statements do not qualify as excited utterances and are therefore inadmissible as hearsay evidence.

¶ 30 B. Confrontation Clause

¶ 31 Defendant also contends Bryant's statements were testimonial, claiming the admission of those statements as evidence violated his sixth-amendment right to confront witnesses against him (U.S. Const., amend. VI) because Bryant was not subject to cross-examination. In *Crawford*, the defendant was charged with stabbing a man who allegedly had sexually assaulted the defendant's wife. *Crawford v. Washington*, 541 U.S. 36, 38 (2004). The wife had given the police a statement implicating her husband in the crime. *Crawford*, 541 U.S. at 40. The wife did not testify at the trial, but her statement was admitted as a statement-against-penal-interest exception to the hearsay rule. *Crawford*, 541 U.S. at 40. The defendant was convicted and he appealed, claiming the trial court erred in allowing the admission of his wife's statement. *Crawford*, 541 U.S. at 41-42.

¶ 32 The Supreme Court held the confrontation clause prohibits the use of out-of-court testimonial statements unless the declarant is unavailable to testify and the defendant had an opportunity to cross-examine the declarant. *Crawford*, 541 U.S. at 68-69. The Supreme Court did not define "testimonial," but it named several examples of testimonial statements, such as (1)

prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and (2) statements given in police interrogations. *Crawford,* 541 U.S. at 52, 68.

¶ 33 The State concedes Bryant's statements *were* testimonial in nature and thus, the admission of those statements violated defendant's sixth-amendment right of confrontation. The State believes this court should not limit the admission of Bryant's statements under the hearsay rule. The State argues that, if Bryant could testify and is therefore available for cross-examination, it should be allowed to present Bryant's statements as hearsay exceptions under either the excited-utterance exception or prior-statements-of-identification exception.

¶ 34 As explained above, we find Bryant's statements do not qualify as excited utterances in light of the totality of the circumstances of this case. We decline to address whether those statements satisfy the requirements of admission under the prior-statement-of-identification exception. We leave that determination for the trial court if it is presented upon remand. We reverse defendant's convictions and remand for a new trial consistent with this decision. Our disposition renders defendant's second and third issues raised in this appeal moot.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we reverse the trial court's judgment and remand for a new trial.

¶ 37 Reversed and remanded.