2019 IL App (2d) 170090-U
No. 2-17-0090
Order filed February 5, 2019

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. BRYAN L. EDMISTON, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Lake County. No. 16-CM-2781 Honorable John J. Scully, Judge, Presiding.

JUSTICE SPENCE delivered the judgment of the court.
Justices Zenoff and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court did not abuse its discretion in admitting the recording of a 911 call as an excited utterance, as the caller described a startling event as it was happening.

¶ 2 Defendant, Bryan L. Edmiston, appeals from the judgment of the circuit court of Lake County, contending that the trial court abused its discretion in admitting a recording of a witness' 911 call. Because the 911 recording was properly admitted as an excited utterance, we affirm.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by information with one count of domestic battery based on bodily harm (720 ILCS 5/12-3.2(a)(1) (West 2016)) and one count of domestic battery based on insulting or provoking contact (720 ILCS 5/12-3.2(a)(2) (West 2016)). He opted for a jury trial.

¶ 5 The following evidence was established at the trial. At about 4 p.m. on August 8, 2016, defendant; his fiancée, Desire Turpin; Desire's mother, Rosemary Turpin; and a male friend went to a cookout at a bar. Rosemary drove them in her minivan.

¶ 6 The foursome was at the bar for about four hours. During that time, defendant and Desire drank several beers and shots of tequila. Rosemary did not consume any alcohol.

¶ 7 When the foursome left the bar, Rosemary drove, with the friend in the front seat. Defendant was seated behind Rosemary, and Desire was seated next to defendant. As they drove home, defendant and Desire argued about defendant having danced with another woman. As the argument escalated, defendant and Desire were yelling at each other.

¶ 8 Because defendant and Desire were screaming at each other, Rosemary told them that if they did not stop she would call the police. Rosemary pulled into a Citgo station to buy cigarettes. As she walked to the store, she told some strangers near the gas pumps that because of the argument she should call the police. According to Rosemary, defendant never touched her or Desire during the argument.

¶ 9 Phillip Board was working behind the register at the Citgo when he saw the van pull in and park near the gas pumps. Suddenly, a regular customer came in and told him to call 911.

¶ 10 Board grabbed a portable phone, called 911, and ran outside toward the van. As he approached the van, he continued to speak with the 911 dispatcher. According to Board, when he was within five feet of the van, he saw defendant grab a woman in the driver's seat and choke her. When a woman in the seat next to defendant tried to pull him off of the driver, defendant

started punching the woman next to him. At that point, a male customer started pulling defendant from the van. Board described defendant as very intoxicated.

¶ 11 The State introduced the recording of the 911 call. Defendant objected based on hearsay. The trial court overruled the objection and admitted the recording as an excited utterance.

¶ 12 According to Board, the recording fairly and accurately represented the 911 call. When the dispatcher answered, Board immediately gave his location and told the dispatcher that a guy was beating his wife. When the dispatcher asked, among other things, if the guy was physically hitting the victim, Board answered yes.

¶ 13 Before the police could arrive, Rosemary drove off. On the way home, she stopped at another gas station for cigarettes. When the foursome arrived home, there were several squad cars parked outside.

¶ 14 Deputy Timothy Fish of the Lake County sheriff's office was dispatched to the Citgo. When he learned that the van had left, he drove to the registered owner's home.

¶ 15 When Deputy Fish arrived, he parked near the home. Shortly thereafter, a van matching the description of the one at the Citgo parked in front of the home. The sliding passenger door opened, and defendant stepped out.

¶ 16 According to Deputy Fish, defendant stated that he had been arguing with his girlfriend and that it had gotten out of hand. As Deputy Fish spoke to defendant, defendant yelled at Desire to tell the police that nothing had happened. Because defendant would not cease doing so, Deputy Fish handcuffed him and put him in the squad car. Deputy Fish described defendant as intoxicated.

¶ 17 Deputy Fish then spoke to Desire, who was crying. He observed that her left cheek near her eye was swollen and red. Deputy Fish took three photographs of Desire's left cheek. Deputy Fish opined that Desire was also intoxicated.

¶ 18 Deputy James Simmons of the Lake County sheriff's office also responded to the home. He observed red bruising on Desire's cheek bone. According to Deputy Simmons, defendant told Desire to tell the deputies that he did not do it.

¶ 19 Desire testified that, as the foursome drove home from the bar, she was mad at defendant for having danced with another woman. Defendant became upset, and the two argued in the van.

¶ 20 According to Desire, after the van pulled into the Citgo, the argument between her and defendant drew a crowd. Although she and defendant were yelling at each other, she denied that defendant ever touched her or Rosemary. A couple of guys tried to start a fight with defendant, because defendant was yelling at her. At that point, Rosemary returned to the van and said that they were leaving because they did not need the police involved. Desire admitted that she yelled for someone to help her, but only because she was angry with defendant. She denied that she yelled at defendant to stop choking Rosemary.

¶ 21 Desire also admitted that she told one of the deputies that defendant had hit her, but she explained that she did so because she was angry and not because defendant had actually done so. She denied having any marks on her face other than dark age-related circles under her eyes. She also denied being afraid of defendant.

¶ 22 Rosemary admitted that defendant contributed to the household expenses. She and Desire had gone to the prosecutor's office and asked that the charges be dropped.

¶ 23 The jury found defendant not guilty of domestic battery based on bodily harm but found him guilty of domestic battery based on insulting or provoking contact. Defendant filed a motion

for a new trial, in which he contended, among other things, that the trial court erred in admitting the 911 recording as an excited utterance. The trial court denied the motion for a new trial and sentenced defendant to 12 months' probation. Defendant, in turn, filed this timely appeal.

¶ 24 II. ANALYSIS

¶ 25 On appeal, defendant contends that the 911 recording was not admissible as an excited utterance. Specifically, he argues that (1) Board was not excited when he made the call and (2) Board's statement was not spontaneous, because Board was responding to questions from the 911 dispatcher.

¶ 26 A well-recognized exception to the hearsay rule is for an excited utterance or spontaneous declaration. *People v. Sutton*, 233 Ill. 2d 89, 107 (2009). The admissibility of such an exclamation requires that (1) there must have been an occurrence that was sufficiently startling to produce a spontaneous and unreflective statement; (2) there must have been an absence of time between the occurrence and the statement such that the declarant could not have fabricated the statement; and (3) the statement must relate to the circumstances of the occurrence. *Sutton*, 233 Ill. 2d at 107. The critical inquiry is whether the statement was made while the excitement of the event predominated. *Sutton*, 233 Ill. 2d at 107.

¶ 27 Whether a statement is admissible as an excited utterance or spontaneous declaration is within the trial court's discretion. *People v. Gwinn*, 366 Ill. App. 3d 501, 517 (2006). A trial court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable or where no reasonable person would take the trial court's view. *People v. Morgan*, 197 Ill. 2d 404, 455 (2001).

¶ 28 In this case, the evidence established that, as Board was working behind the cash register, a customer suddenly entered the store and told him to call 911. Board immediately grabbed a

portable phone, called 911, and ran toward the van. As he approached the van, he saw defendant choking Rosemary and then punching Desire. He also saw another customer attempt to pull defendant from the van. The situation was clearly an emergency that Board spontaneously reported to the 911 dispatcher. Further, he reported it so promptly that there was no time for reflection and fabrication. Thus, Board's statement to the 911 dispatcher was admissible as an excited utterance.

¶ 29 Although defendant contends that Board's statement was not spontaneous, because it was in response to the dispatcher's questioning, we disagree. Immediately after the dispatcher answered the call, Board gave his location and stated that a man was beating his wife. That part of his statement was not in response to any questioning. Although Board answered yes when the dispatcher asked him if the man was physically hitting the victim, that response did not detract from the overall spontaneity of his statement. In the context of a 911 call about an ongoing emergency, being asked about what is happening does not destroy the spontaneity of the response. See *People v. Damen*, 28 Ill. 2d 464, 472 (1963) (a police officer simply asking a witness what happened does not destroy the spontaneity of the witness's statement). Thus, Board's statement was spontaneous, notwithstanding that it was made partly in response to a question from the 911 dispatcher.

¶ 30 Additionally, defendant's reliance on *People v. Sommerville*, 193 Ill. App. 3d 161 (1990), is misplaced. In *Sommerville*, because a rape victim's statements to her fiancé were made in response to a series of questions after the incident, the court rejected the State's argument that they were spontaneous declarations. *Sommerville*, 193 Ill. App. 3d at 175. Here, however, Board did not provide information in response to a series of questions following the incident.

Rather, as discussed, the startling event was ongoing. Thus, unlike in *Sommerville*, Board's statement to the 911 dispatcher was not the product of post-occurrence questioning.

¶ 31 To the extent that defendant contends that Board could not have made an excited utterance when he was not a victim, we disagree. Defendant does not cite, nor do we find, any case supporting that proposition. To the contrary, there are numerous cases in which courts have affirmed the admission of excited utterances made by nonvictims. See, *e.g.*, *People v. Herring*, 2018 IL App (1st) 152067, ¶¶ 68-69 (mother's 911 call about her son's death admissible as an excited utterance). Because Board was a witness to, and made the 911 call as a result of, the occurrence, his statement to the 911 dispatcher was admissible as an excited utterance.

¶ 32 III. CONCLUSION

¶ 33 For the reasons stated, we affirm the judgment of the circuit court of Lake County. As part of our judgment, we grant the State's request that defendant be assessed $50 as costs for this appeal. 55 ILCS 5/4-2002 (West 2016); see also *People v. Nicholls*, 71 Ill. 2d 166, 178 (1978).

¶ 34 Affirmed.