FOURTH DIVISION
December 19, 2013

No. 1-11-0818

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. 09 CR 16351
	)	
TRAMAINE SHORTY,	)	Honorable
	)	Matthew E. Coghlan,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE HOWSE delivered the judgment of the court.
Justices Lavin and Epstein concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant's conviction is affirmed. The trial court committed harmless error in admitting a recording of an anonymous call to 9-1-1 describing what the caller heard from a second floor apartment as a rape and beating in progress to demonstrate the course of police officers' conduct in arriving at the scene and the call was admissible as an excited utterance. The prosecutor's remarks in closing argument describing how the victim was traumatized by the event to explain her demeanor at trial did not deprive defendant of a fair trial.

¶ 2 The State charged defendant Tramaine Shorty with multiple counts of aggravated

criminal sexual assault based on multiple acts of sexual penetration by defendant and Kenneth Thomas and a single act of sexual penetration by Demetrius Dillon. A jury acquitted defendant of the charges based on his own acts of sexual penetration and those of Kenneth Thomas and found defendant guilty based on the single act of sexual penetration by Demetrius Dillon. The jury also found that the victim was under 18 years of age when the crime occurred, that the crime was part of a single course of conduct committed against the same victim by multiple individuals, and defendant voluntarily participated in the crime with knowledge of the others' participation. The trial court entered a judgment of conviction and sentenced defendant to 20 years' imprisonment. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 The State indicted defendant, Tramaine Shorty, for the aggravated criminal sexual assault of L.H., a minor. The State jointly indicted Kenneth Thomas and Demetrius Dillon for the assault. The indictments alleged defendant, Thomas, and Dillon each committed separate acts of sexual penetration, and that L.H. suffered bodily harm during the assault and the perpetrators acted in a matter to threaten or endanger L.H.'s life. The trial court granted defendant's motion to sever his trial from Thomas and Dillon.

¶ 5 Before trial, the State moved to introduce into evidence a recording of a 9-1-1 call by an anonymous caller. The caller notified the police dispatcher of the assault on L.H., and her call led to defendant's arrest. The trial court ruled that the recording of the call was admissible as an excited utterance, alternatively the recording was admissible to show the course of police conduct, and finally that the statements were nontestimonial.

¶ 6 L.H. was seventeen-years old at the time of the assault. At the time, she was staying with a friend at her friend's grandmother's house in Chicago. On the day of the assault, L.H. had spent the day with her friend and her friend's boyfriend at the boyfriend's house. L.H. left when the other two began to argue. L.H. was walking to her friend's grandmother's house, alone, when she encountered defendant and Thomas walking on the opposite side of the street. L.H. heard them call out to her, thought she recognized defendant as someone she knew, and approached them. When L.H. realized her mistake, she continued walking. Defendant and Thomas engaged L.H. in conversation and the three began walking together. Defendant testified he was walking with Thomas when L.H. waved at them. They walked together to Thomas's former residence.

¶ 7 L.H., defendant, and Thomas arrived at the building and sat on the porch talking. Defendant claimed they discussed having a "threesome." While they were talking, Dillon approached and defendant went to speak with him. Defendant testified the person he spoke to was not Dillon, but an individual he knew as "Pee Wee." L.H. could not hear their conversation. Dillon left while the others were still outside. L.H., defendant, and Thomas entered the building and went to the second floor apartment, however defendant testified Thomas and L.H. were still on the porch when he left to buy liquor, and were still there when he returned. Defendant did leave to purchase liquor wile L.H. remained behind with Thomas and later returned to the apartment with L.H. and Thomas.

¶ 8 Thomas repeatedly attempted to touch L.H.'s breasts, but she pushed his hand away. L.H. testified she asked to leave. Defendant poured the liquor he purchased into three plastic

cups and tried to get L.H. to take a drink by holding her cup and attempting to pour the alcohol into her mouth, spilling the alcohol on her shirt. Defendant testified L.H. voluntarily drank the liquor and said that she wanted to have a "threesome." Defendant was standing while L.H. and Thomas sat on the couch. Both men tried to touch her breasts and she told them to stop. They did not. L.H. tried to stand but defendant pushed her back down to the couch.

¶ 9 Defendant ordered L.H. to stand and she did. He pulled her pants and underwear down and, standing behind her, bent her forward toward the couch. Defendant testified L.H. removed her own pants and underwear. Thomas exposed his penis. L.H. observed defendant putting on a condom. Thomas forced L.H.'s head down until he could place his penis in her mouth. Defendant penetrated L.H.'s vagina. The victim testified she said "stop" and tried to move but defendant held her in place. Defendant admitted he had vaginal and oral sex with L.H. Throughout, L.H. kept saying "stop, I just want to go." L.H. testified that she saw an open window in the apartment and purposefully tried to speak loudly, wondering if anyone outside could hear her.

¶ 10 L.H. testified that the assault continued as defendant and Thomas exchanged positions and Thomas vaginally penetrated L.H. while defendant tried to force his penis into her mouth. Defendant admitted he and Thomas exchanged positions and testified that L.H. performed oral sex on him. Defendant testified they finished and he went to the bathroom, and up until that time he did not see Dillon enter the apartment. L.H. testified defendant answered a knock at the door and let Dillon into the apartment. Dillon grabbed his penis and L.H. said "you're not going to get anything." L.H. attempted to retrieve her clothes but defendant grabbed her by the neck, forced

her against a wall, and stated she was going to finish what they started. L.H. returned to the couch where Thomas was now seated with his penis exposed. Thomas again forced L.H.'s head down toward his penis while Dillon stood behind her and penetrated her vagina. At some point, L.H. heard defendant say "shoot this bitch" because she was not cooperating. L.H. began crying and pleading she would cooperate. Defendant denied grabbing L.H. or threatening to shoot her.

¶ 11 At that moment, several police officers entered the apartment. Dillon was pulling up his pants when police entered and Thomas was seated on the couch. Defendant attempted to flee but was apprehended in the apartment. Police placed defendant, Thomas, and Dillon under arrest. L.H. told police she had been raped and that she was told they were going to shoot her.

¶ 12 Police testified they were dispatched to a report of a sexual assault. A 9-1-1 operator testified she received a call reporting a rape and identified a recording of the call which was played for the jury. The caller reported 3 or 4 men raping a young girl in an abandoned house. The caller stated she could hear them beating on a girl. The caller also stated police would need someone to go in the front and in the back. One police unit arrived and spoke with the same 9-1-1 caller, who directed them to the second floor apartment. Another unit, responding to the same call, went to the rear of the building. Defendant admitted speaking to the victim by telephone after his arrest, but denied apologizing or offering to "buy her something nice" if she changed her story.

¶ 13 Before deliberations, the defense submitted a jury instruction limiting the jury's use of the recording of the 9-1-1 call. The trial court instructed the jury that it may only consider the recording for the purpose of showing the course of police conduct. The jury found defendant not

guilty based on his own acts of sexual penetration and not guilty for Thomas's acts of sexual penetration. The jury found defendant guilty by accountability for Dillon's act of sexual penetration of L.H.'s vagina. The jury found that L.H. was under 18 years of age when the offense was committed and that the offense was committed on the same victim by one or more other individuals, and defendant participated with the knowledge of the others' participation, subjecting defendant to extended term sentencing. The trial court did not impose an extended term and instead sentenced defendant to 20 years' imprisonment.

¶ 14 This appeal followed.

¶ 15 ANALYSIS

¶ 16 Defendant argues that his conviction should be reversed and the cause remanded for a new trial because the court erred in admitting the 9-1-1 call into evidence. "A trial court's evidentiary rulings on hearsay testimony are reviewed under an abuse of discretion standard, and an abuse of discretion will be found only where the trial court's ruling is 'arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.' [Citation.]" *People v. Munoz*, 398 Ill. App. 3d 455, 479-80 (2010). "A reviewing court will not disturb the trial court's decision regarding the admission of evidence at trial absent a clear abuse of discretion." *People v. Robinson*, 217 Ill. 2d 43, 62 (2005). "The admission of hearsay evidence is harmless error where there is no reasonable probability that the jury would have acquitted the defendant absent the hearsay testimony." *People v. Nevitt*, 135 Ill. 2d 423, 447 (1990).

¶ 17 Defendant also argues this matter should be remanded for a new trial because the

prosecutor made improper remarks during closing argument, depriving him of a fair trial.

¶ 18 1. Admission of 9-1-1 Call

¶ 19 Defendant argues the trial court committed reversible error in ruling that a recording of a 9-1-1 call regarding the incident (a) was admissible as substantive evidence under the excited utterance exception to the hearsay rule; (b) was admissible, not for the truth of the matters asserted, but to show the course of police conduct; and (c) did not violate defendant's rights under the confrontation clause.

¶ 20 A. Standard of Review

¶ 21 Initially, we decline defendant's invitation to review the trial court's ruling on the admission of the 9-1-1 call *de novo*. "It is true that reviewing courts sometimes review evidentiary rulings *de novo*. This exception to the general rule of deference applies in cases where a trial court's exercise of discretion has been frustrated by an erroneous rule of law. [Citation.]" (Internal quotation marks omitted.) *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 22 Defendant does not argue that the exception to the hearsay rule allowing the admission of excited utterances is an "erroneous rule of law." Rather, defendant disagrees with the application of the rule of law to the to the facts before the court. That is an exercise in judicial discretion. *People v. Moscatello*, 114 Ill. App. 2d 16, 38 (1969) ("By judicial discretion is meant sound discretion guided by law. *** Judicial power is never exercised for the purpose of giving effect to the will of the judge,--always for the purpose of giving effect to the will of the Legislature; or in other words, to the will of the law. [Citation.] Deciding what is just and proper under the circumstances of a case is such judicial discretion.") (Internal quotation marks omitted.). "The

decision whether to admit evidence cannot be made in isolation. The trial court must consider a number of circumstances that bear on that issue, including questions of reliability and prejudice. [Citation.] In this case, the trial court exercised discretion in making these evidentiary rulings, *i.e.*, the court based these rulings on the specific circumstances of this case and not on a broadly applicable rule." *Id.* at 89-90. Accordingly, we will apply the deferential abuse of discretion standard of review.

¶ 23 B. Limited Use for Course of Police Conduct

¶ 24 The State argues defendant's arguments regarding use of the statement as substantive evidence must fail because the trial court gave the jury a limiting instruction that it was not to consider the recording as substantive evidence, but only to show the course of police conduct. Defendant replies the limiting instruction was (1) too late because the jury first heard the recording without any instruction as to a limitation on its use; (2) insufficient to properly instruct the jury as to the limited use of the evidence; and (3) failed to cure the prejudice to defendant.

¶ 25 The defense moved for a mistrial before defendant testified on the grounds the recording was inadmissible and even if admissible the State failed to lay a proper foundation. During arguments on defendant's motion for a mistrial, the State argued it was not asking to introduce the tape to corroborate the victim's account, but to explain why police acted in the way they did.

¶ 26 The trial court denied defendant's motion for a mistrial. The court found the State laid a proper foundation for the recording. The court held that the statement was admissible both as substantive evidence under the excited utterance exception and for the limited purpose of showing why officers responded to the crime scene. Despite the former ruling, the court

instructed defense counsel he could prepare a limiting instruction for the jury since the State indicated it was not offering the recording for the truth of the matter asserted therein but to show the course of police conduct.

¶ 27 The defense did object to the admission of the tape and asked for a sidebar, which the trial court did not allow. However, defendant did not request a limiting instruction when the State played the recording for the jury. "[W]hen evidence is competent only for one purpose, the other party is entitled by instructions to have it limited to the purpose for which it is proper. [Citations.] If the opponent of the evidence fails to ask for an instruction confining the evidence to its legitimate sphere, he is deemed to have waived any objection he may have." *People v. Edwards*, 144 Ill. 2d 108, 168-69 (1991). We will not consider this issue waived because the trial court's ruling on the admissibility of the statement as an exited utterance would not have required a limiting instruction. Although our supreme court has instructed that the better practice is to instruct the jury at the time evidence that may be considered for a limited purpose is received, the failure to do so does not mandate reversal. See *People v. Heard*, 187 Ill. 2d 36, 61 (1999) (other-crimes evidence). Assuming the trial court admitted the statement for the limited purpose of showing the course of police conduct, giving the limiting instruction prior to deliberations did not deprive defendant of a fair trial; "*i.e.*, a trial free of errors so egregious that they probably caused the conviction" (*People v. Easley*, 192 Ill. 2d 307, 344 (2000)).

¶ 28 The trial court instructed the jury as to the limited purpose of the evidence. Thus, no error occurred. Nor can we find that the timing of the instruction prejudiced defendant. Prejudice means an undue tendency to suggest making a decision on an improper basis. See

generally *People v. Lewis*, 165 Ill. 2d 305, 329 (1995). Here, we cannot say the jury convicted defendant based on the caller's statement that there were 3 or 4 guys raping a young girl. The jury acquitted defendant for his own acts of sexual penetration and those by Thomas, and only convicted defendant based on accountability for Dillon's conduct.

¶ 29 Regardless, defendant argues, the 9-1-1 call is not admissible at all to show the course of police conduct because the statement contained the substance of the information conveyed to police and that information went to the essence of the dispute at trial. Defendant also argues that the statement was not necessary to show the police course of conduct because the State had other evidence sufficient to show why police responded to the location of the crime.

¶ 30 A hearsay statement by a bystander to a crime may be offered for "some relevant nonhearsay purpose" such as "the steps taken by the police in investigating the crimes and arresting the defendant," but only "where such testimony is necessary and important." *People v. Warlick*, 302 Ill. App. 3d 595, 598-99 (1998) (citing *People v. Simms*, 143 Ill. 2d 154, 174 (1991)). There is no hearsay problem when police testify they heard "some unspecified words and then did something." *Id*. at 599. When such testimony is offered,

> "[t]he trial judge first must determine whether the out-of-court words, offered for some purpose other than their truth, have any relevance to an issue in the case. If they do, the judge then must weigh the relevance of the words for the declared nonhearsay purpose against the risk of unfair prejudice and possible misuse by the jury. [Citation.] *** Police procedure or not, when the words

> go to the very essence of the dispute [citation], the scale tips against admissibility." (Internal quotation marks omitted.) *Warlick*, 302 Ill. App. 3d at 599-600.

¶ 31 In this case, the State purported to admit the recording for the purpose of showing how the police came to the apartment where the crime occurred. By playing the 9-1-1 call, the evidence went beyond testimony that police heard some words and then did something. The State has pointed to no issue concerning the officers' reasons or motive for going to the apartment. See *Warlick*, 302 Ill. App. 3d at 600. The defense argued there was no issue with why police responded to the scene. If the State wanted to show only how the attack was stopped and defendant was arrested, "[i]t would have been enough for the officer[s] to testify [they] received a radio message, then went to the [apartment]." *Warlick*, 302 Ill. App. 3d at 600. "The contents of the call had slight or no relevance when offered for a nonhearsay purpose. It did not help the jury decide the case." *Warlick*, 302 Ill. App. 3d at 600. There was no good reason why the jury had to hear the substance of what the caller said. See *Id*. On the other hand, the statement that a young girl was being raped and beaten goes to the very issue in the case. Accordingly, the admission of the call for the purpose of showing the course of police conduct was error. *Id*. at 600-01.

¶ 32 However, the erroneous admission of hearsay evidence is subject to a harmless error analysis. *Id*. at 601. "Erroneous admission of hearsay will not be held reversible if there is no reasonable probability the jury would have acquitted the defendant had the hearsay been excluded." *Warlick*, 302 Ill. App. 3d at 601. As previously noted, the jury acquitted defendant

for the charges based on his own acts of sexual penetration and for Thomas's acts. Defendant admitted he and Thomas had vaginal and oral sex with the victim in this case but testified their conduct was consensual. The jury must have accepted defendant's testimony that he engaged in consensual sex. Defendant argues the caller corroborated the victim's testimony that Dillon sexually assaulted her but did not corroborate the victim's testimony that defendant and Thomas also sexually assaulted her because their sexual acts occurred before the call was placed. The jury did not improperly convict defendant for Dillon's conduct based on the caller's out-of-court statement. The statement did not secure a conviction based on defendant's conduct. It is unlikely that the jury would have acquitted defendant for Dillon's conduct had the recording been excluded. In addition to the victim's testimony, the jury heard corroborating testimony from police who saw Dillon standing behind the victim pulling up his pants when they arrived, observed the victim to be crying and shaking, and saw defendant attempting to flee. The victim immediately told the officer she was raped. We find there is no "reasonable probability that erroneously admitted testimony contributed to a conviction." *People v. Lambert*, 288 Ill. App. 3d 450, 460 (1997). Thus, accepting that the recording was admitted for the limited purpose of showing the course of police conduct and such admission was erroneous, the admission of the hearsay was, in this case, harmless error. *Id*.

¶ 33 C. Excited Utterance Exception

¶ 34 Despite the trial court's limiting instruction, the court initially admitted the 9-1-1 caller's statement as substantive evidence under the excited utterance exception. Defendant argues the recording of the 9-1-1 call does not satisfy the requirements for admission as an excited utterance

and, even if it does, its probative value is outweighed by its prejudicial effect on the jury. We disagree.

> "For a hearsay statement to be admissible under the excited utterance or spontaneous declaration exception, there must be: (1) an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) an absence of time for the declarant to fabricate the statement; and (3) the statement must relate to the circumstances of the occurrence. [Citation.] To be admissible, then, a statement must be spontaneous, excited and unreflecting. To this end, courts consider the totality of the circumstances, including: the time elapsed between the event and the utterance, the nature of the event, the declarant's mental and physical condition, and the presence of self-interest." *People v. Dobbey*, 2011 IL App (1st) 091518, ¶ 44.

¶ 35 Defendant concedes the recording satisfies the foregoing requirements for admission as an excited utterance. Defendant argues the recording does not satisfy an additional requirement, applied to "virtually all lay witness testimony," that the statement must be based on the declarant's personal knowledge. Defendant cites authority from other jurisdictions which have found that an excited utterance must be based on the declarant's personal knowledge to be admissible. Defendant concedes the caller would have been able to testify to what she saw--the victim and her attackers outside the abandoned building--and to what she heard. Defendant concludes, however, that the 9-1-1 caller's specific statements that there were "about 3 or 4 guys raping this little girl in this abandoned house," and that they were "beating on" her, were not

based on her personal knowledge, but "were based entirely on [the caller's] 'conjecture and surmise.' "

¶ 36 The State argues that Illinois has no requirement that an excited utterance be based on the delcarant's personal knowledge to be admissible. Regardless, the State argues, the caller did have personal knowledge of what she reported to the dispatcher based on what she saw and heard. Specifically, the State argues the caller "heard the sounds of rape." The State argues that conclusion is substantiated by the victim's own testimony that she repeatedly told the men to stop, defendant and Thomas talked about the victim performing oral sex, the victim's comments to Dillon, and her pleas not be shot and that she would cooperate. Defendant replies the caller could not have had personal knowledge that the victim was being beaten and raped based on what she told the 9-1-1 operator she heard. Defendant argues there is no evidence the caller heard anything else to indicate a rape--including the victim's telling her assailants to stop or her statement to Dillon that he was "not going to get anything." In sum, defendant argues, the sounds and words coming from the apartment led the caller to speculate that a beating and rape was occurring, but that is not enough to satisfy the personal knowledge requirement.

¶ 37 Even if the trial court had admitted the statement as substantive evidence, we would find no abuse of discretion. There is no question that the declarant must have personal knowledge of the subject of the declaration for an out-of-court statement to be admissible under the excited utterance exception. This court has held, with regard to an excited utterance, that "[i]t must appear at least inferentially that the declarant observed the matters he reports and that there is nothing to make a contrary inference more probable." *People v. Fields*, 71 Ill. App. 3d 888, 893

(1979). This court has also found federal court decisions on rules of evidence that are identical to Illinois' rules persuasive authority (*Citibank N.A. v. McGladrey and Pullen, LLP*, 2011 IL App (1st) 102424, ¶ 21) and the federal courts have held that personal knowledge of the events described in an excited utterance can be demonstrated by the statement itself (*Miller v. Keating*, 754 F.2d 507, 511 (3d Cir. 1985) (construing Federal Rules of Evidence 602 and 803(2) (excited utterance exception))). In construing this exception, the Third Circuit stated that:

> "Direct proof of perception, or proof that forecloses all speculation is not required. On the other hand, circumstantial evidence of the declarant's personal perception must not be so scanty as to forfeit the guarantees of trustworthiness which form the hallmark of all exceptions to the hearsay rule. [Citation.] When there is no evidence of personal perception, apart from the declaration itself, courts have hesitated to allow the excited utterance to stand alone as evidence of the declarant's opportunity to observe. [Citations.] In some cases, however, the substance of the statement itself does contain words revealing perception." *Id*. at 511.

¶ 38 In this case, the substance of the statement contains words revealing the caller's perception. The caller reported hearing "beating on a girl" and men "[t]elling her to suck their thing." Defendant does not dispute that the 9-1-1 caller heard sounds from the apartment, only the extent of what she heard. We find defendant's argument that there is no evidence the caller

heard the victim telling her assailants to stop, or that Dillon was "not going to get anything" unpersuasive. The trial court heard sufficient evidence of the declarant's personal knowledge of the events she was describing in the call itself to determine that the statement was admissible as an excited utterance. See generally *Huff v. White Motor Corp.*, 609 F.2d 286, 294 (7th Cir. 1979) ("The burden is on the proponent of the evidence to prove capacity by a preponderance of the evidence.").

¶ 39 Defendant's specific argument that what the caller heard only led the caller to speculate that a beating and rape was occurring in the vacant apartment, but her statement to that effect was not based on her personal knowledge, also fails. Defendant relies on *Brown v. Keane*, 355 F.3d 82, 90 (2d Cir. 2004), in support of his argument that the 9-1-1 caller's statements were "conjecture and surmise" and, therefore, inadmissible. *Brown* is distinguishable. In *Brown*, the Second Circuit found that a statement by a 9-1-1 caller who did not testify at trial was not admissible under the present sense impression exception (*Brown*, 355 F.3d at 89), or as an excited utterance (*Brown*, 355 F.3d at 90), because the government "failed to demonstrate that the caller's incriminating report that [the defendant] was shooting was based on any sensory observation; to the contrary *** it appears to have been based on conjecture" (*Brown*, 355 F.3d at 84). Notable is the court's description of how a declarant obtains personal knowledge of the facts of his or her report as "sensory" observation rather than "visual" observation. See *Id*. at 84. Defendant has cited us to no clear authority that direct auditory perception is insufficient to provide personal knowledge of events described based thereon. Nonetheless, the fact that in this case the 9-1-1 caller's knowledge *was* based on her auditory senses rather than her visual senses

is not the reason we find that *Brown* is not persuasive authority for defendant's position.

¶ 40 The issue in *Brown* was whether the defendant fired at police, or whether police fired at defendant without good cause. *Brown*, 355 F.3d at 85. The court addressed first whether the caller's statements were admissible under the present sense impression exception. *Id*. at 87. There was no dispute that two plainclothes police officers fired at the defendant, but the defendant denied firing a shot. *Id*. The lower court found several inconsistencies between the caller's description of events and the other evidence, most notably that the caller, who stated that the defendant was doing the shooting, failed to mention the police officers. *Id*. at 86. On review, the *Brown* court found that the lower court persuasively demonstrated that the caller did not witness the shooting "but rather heard the shots and, having recently seen the armed men leave the bar, assumed they were the ones doing the shooting." *Brown*, 355 F.3d at 88-89. The court held that "[g]iven the irreconcilable differences between the events that indisputably occurred in the street and the caller's very different description it is most unlikely that the caller saw what was happening in the street. In essence, there was no reasonable basis for believing that the caller saw [the defendant] firing [a] gun." *Brown*, 355 F.3d at 89.

¶ 41 Next, the *Brown* court held that the excited utterance exception did not apply because it "does not obviate the requirement that the declarant have personal knowledge of the subject of his report." *Brown*, 355 F.3d at 90. The court held that the caller's conjecture and surmise did not become admissible "merely because it was uttered out of court in a state of excitement." *Id*. Based on its finding that the government failed to show that the caller saw what he reported, the court held that "the caller's excitement cannot justify the receipt of his statement based on

surmise." *Brown*, 355 F.3d at 90. "A statement expressing conjecture on a question as to which the declarant lacks personal knowledge simply cannot bear 'particularized guarantees' of reliability sufficient to overcome the Sixth Amendment presumption of inadmissibility of hearsay statements." *Brown*, 355 F.3d at 90.

¶ 42 We find that *Brown* does not persuade us to find the caller's statements in this case inadmissible because, unlike *Brown*, in this case the statement bears particularized guarantees of trustworthiness. "The reliability and therefore, admissibility, of a spontaneous declaration comes not from the reliability of the declarant, but from the circumstances under which the statement is made." *People v. Wright*, 234 Ill. App. 3d 880, 892 (1992). The circumstances described in the call provide the basis for finding that her spontaneous declaration was reliable. The statement in this case describes the circumstances under which the declarant stated "it's about 3 or 4 guys raping this little young girl." The caller stated that "at first they was in the gangway. Now they [are] inside the abandoned building." The caller stated that she could "hear them beating on a girl. Telling her to suck their thing." The recorded statement bears particularized guarantees of reliability sufficient to bring the statement within the excited utterance exception.

¶ 43 Based on the information conveyed by the caller, there is also a sufficient basis for concluding that the caller actually did perceive what she reported rather than surmised what was happening in the apartment. See *Brown*, 355 F.3d at 89. "[T]he key question for the trial court is whether a reasonable trier of fact could believe that a witness had personal knowledge of the facts about which he testified. [Citation.] Evidence is inadmissible *** only if in the proper exercise of the trial court's discretion it finds that the witness could not have actually perceived

or observed that which he testifies to." (Internal quotation marks omitted.) *United States v. Joy*, 192 F.3d 761, 767 (7th Cir. 1999). In this case, unlike *Brown*, the caller's statement is not inconsistent with any other evidence and the caller did not fail to mention an important fact that would have been known to someone in her position had she heard what she purported to hear. In *Brown*, the caller made an affirmative statement that the defendant was doing the shooting under circumstances that could not have permitted him to possess that information other than by conjecture. *Id*. at 88-89. On the contrary, the caller in this case not only reported the fact of what she perceived auditorily, she also reported the exact circumstances that allowed her to possess that information.

¶ 44 The caller perceived sufficient facts to determine that a rape was occurring. *Joy*, 192 F.3d at 767 (9-1-1 call admitted as an excited utterance, and court found sufficient personal knowledge to admit statement during call that "he just pulled some burglaries tonight" where "although there was no evidence which showed that [the caller] ever observed [the defendant] burglarize a house, there was more than enough circumstantial evidence to show that [the caller] could have inferred [the defendant] committed a burglary, and that this inference was reasonable."). The caller's statement is not rendered inadmissible by the fact that she went beyond stating what the men said, or even that she could hear beating, and stated that the young girl was being raped. "[T]he excited utterance exception allows a broader scope of subject matter coverage than does the present sense impression exception. [Citation.] Under Rule 803(2), if the subject matter of the statement would likely be evoked by the event, the statement may be admitted, even if it goes beyond a mere description of the event." *United States v.*

Harper, No. 08-CR-307 (E.D. Wis. Apr. 13, 2010) (citing *U.S. v. Moore*, 791 F.2d 566 (1986)).

¶ 45 In *Moore*, the Seventh Circuit rejected the defendant's argument that the declarant's statement was not admissible as an excited utterance because the statement showed the declarant "mentally 'connecting-up' the supposed startling event with something which preceded the event, and that this indicates conscious reflection." *Moore*, 791 F.2d at 572. The court suggested as a guidepost that:

> "[i]f the subject matter of the statement is such as would likely be evoked by the event, the statement should be admitted. [Citation.] However, the fact that a statement goes beyond a mere description of the event may be considered in deciding whether the statement is sufficiently related to the event to be spontaneous, or whether it was the product of conscious reflection." *Moore*, 791 F.2d at 572.

¶ 46 In response to the defendant's "connecting-up" argument, the *Moore* court found that "the caselaw indicates that even statements that refer to prior events or thoughts may be admissible as excited utterances." *Moore*, 791 F.2d at 572. The court held that the statement in that case did not indicate conscious reflection, especially given the declarant's excitement, and that the lower court did not abuse its discretion. *Id.*

¶ 47 The *Moore* court addressed a challenge as to whether the declaration related to the startling event or was the product of conscious reflection. We find that the *Moore* court's rationale applies to defendant's argument that the 9-1-1 caller's statements were the product of conjecture and surmise. The subject matter of the statement that a young girl was being raped "is

such as would likely be evoked by" seeing men with a young girl, hearing them in an abandoned apartment, hearing the men talking about the girl performing oral sex, and beating sounds. Moreover, the statement is sufficiently related to the events and circumstances described by the caller to be spontaneous. *Moore*, 791 F.2d at 572. Defendant's quarrel lies more with the accuracy of the declarant's perception that a rape was occurring than with the veracity of her belief that a rape was occurring, but veracity is what the excited utterance exception tests.

> "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." *Fields*, 71 Ill. App. 3d at 893 (quoting *People v. Damen*, 28 Ill. 2d 464, 471 (1963)).

¶ 48 Thus, "[t]he lack of time to reflect on the event or to fabricate serves as a reasonable

substitute for an oath and makes the declaration reliable as an expression of the declarant's real belief as to the facts just observed. The accuracy of the observation in any case would depend on both objective and subjective factors." *Fields*, 71 Ill. App. 3d at 893. The fact that these subjective and objective factors might be challenged does not render the excited utterance inadmissible or unduly prejudicial. "The factors relating to the declarant's subjective or objective ability to observe could ordinarily be sufficiently developed through examination of other witnesses at trial and argued to the finder of fact to discredit the accuracy and reliability of the declaration. The weight and credibility to be given to the declaration would be considered with the other evidence in reaching a verdict." *Fields*, 71 Ill. App. 3d at 894. In this case, the 9-1-1 caller's utterance may be taken to express her real belief and there is nothing to make a contrary inference more probable. Accordingly the statement could have been properly admitted as an exited utterance. *Fields*, 71 Ill. App. 3d at 894 (the declarants' "utterances may be taken to express the real belief of the declarants. There is nothing to make a contrary inference more probable. *** For the foregoing reasons we find that the declaration *** was properly admitted into evidence and that defendants were not prevented from effectively arguing the reliability of the statement.").

¶ 49 The admission of the statement was not unduly prejudicial. The jury did not accord undue weight to the statement because it acquitted defendant of the charges based on his own conduct. Even if the jury had convicted defendant for all of the charges, we would not find the admission of the statement was unduly prejudicial. "Only evidence which is unfairly prejudicial, that is, having an undue tendency to suggest decision on an improper basis such as bias,

sympathy, hatred, contempt, or horror will be excluded." *Rush v. Hamdy*, 255 Ill. App. 3d 352, 366 (1993). Had the jury been allowed to consider the statement as substantive evidence, it would have decided what weight to give the testimony based on all of the circumstances under which the statement was made. *People v. Graham*, 392 Ill. App. 3d 1001, 1009 (2009) ("It is the trier of fact's duty to *** determine the appropriate weight of the testimony"). But there is nothing in the statement that would lead the jury to convict on an improper basis.

¶ 50 But the trial court did not admit the statement as an excited utterance, and limited the jury's consideration of the statement to showing the course of police conduct. As we have previously stated, the error in admitting the statement for that purpose was harmless as a matter of law because defendant was not prejudiced thereby. We now also hold that the error was harmless because the statement could have been admitted as substantive evidence.

¶ 51 D. Confrontation Clause

¶ 52 The trial court's admission of the recorded statement does not violate defendant's rights under the confrontation clause. "In *Crawford*, the Supreme Court held that where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." *People v. Leach*, 2012 IL 111534, ¶ 77. "Resolution of a claim under *Crawford* requires a court to answer a series of questions: (1) Was the out-of-court statement hearsay because it was offered by for the truth of the matters asserted therein? (2) If hearsay, was the statement admissible under an exception to the hearsay rule? (3) If admissible hearsay, was the statement testimonial in nature? and (4) If testimonial, was admission of the statement reversible error?" *Id.* at ¶ 63. This court has

rejected any bright line rule which would hold a 9-1-1 call testimonial or not testimonial in nature. *People v. West*, 355 Ill. App. 3d 28, 39-40 (2005) abrogated by *People v. Stechly*, 225 Ill. 2d 246, 299 (2007) (holding statements by juvenile sexual assault victim to clinical specialist and social worker were testimonial in nature).

> "Rather, we believe that a court should determine, on a case-by-case basis, whether the statement made to the 911 dispatcher was: (1) volunteered for the purpose of initiating police action or criminal prosecution; or (2) provided in response to an interrogation, the purpose of which was to gather evidence for use in a criminal prosecution. In the first instance, the statement is testimonial in nature because an objective individual would reasonably believe that when he or she reports a crime they are 'bearing witness' and that their statement will be available for use at future criminal proceedings. [Citation.] In the later case, the statement is testimonial in nature because it is the product of evidence-producing questions, the responses to which, if used to convict a defendant, would implicate the central concerns underlying the confrontation clause. [Citation.] Second, in performing this analysis, a court should examine a caller's statement in the same manner as it would a victim's statement to a treating medical professional. Accordingly, statements which are

> made to gain immediate official assistance in ending or relieving an exigent, perhaps dangerous; situation [citation] are comparable to those made to medical personnel regarding descriptions of the cause of symptom, pain or sensations, or the inception or general character of the cause or external source thereof [citation] and, as such, are not testimonial in nature. However, statements volunteered for the purpose of invoking police action and the prosecutorial process [citation], or responses to questions posed for the purpose of collecting information useful to the criminal justice system, [citation] are testimonial in nature." *West*, 355 Ill. App. 3d at 39-40.

¶ 53 The foregoing principles lead us to conclude that the statements the caller made to the 9-1-1 dispatcher were not testimonial in nature and were properly admitted at trial. The call was made while the attack on the victim was in progress. The purpose of the call was to request police assistance for the victim. The dispatcher's questions as to what was going on, the location, the victim's age, and the number of assailants "were posed in order to gather information about the situation and to secure [help for the victim], not to produce evidence in anticipation of a potential criminal prosecution." *West*, 355 Ill. App. 3d at 40. Accordingly, the trial court properly admitted the statement. See also *People v. Sutton*, 233 Ill. 2d 89, 109, 116 (2009) (holding statement made to police officers at scene of their response was admissible under the spontaneous declaration exception to the hearsay rule and were nontestimonial and did not

implicate the defendant's right to confrontation under Crawford).

¶ 54 2. Prosecutor's Closing Argument

¶ 55 Finally, defendant argues that comments by the prosecutor describing the effect of the events on the victim, and attempting the explain the victim's demeanor on the stand--which the parties agree was unemotional as to matters regarding the assault--as the result of the trauma she suffered, were improper and prejudicial and deprived him of a fair trial. The comments defendant complains of described the victim as a young girl who was traumatized by this event and who had withdrawn into her own shell. The prosecutor stated that this was the way in which the victim protected herself, by making it appear that she was not bothered by the incident. The prosecutor also stated that the victim's testimony made it apparent that she had low self esteem and blamed herself for the incident, which caused her to minimize events. Defendant argues the prosecutor's comments impermissibly crossed into her own "expert psychological testimony" as to the victim's psychological profile and the impact of the events on her psyche; and, therefore, the prosecutor's argument that the victim's demeanor made her story more believable was not based on any evidence in the case or any reasonable inferences from the evidence and was improper.

¶ 56 The defense did not object to the allegedly erroneous portions of the prosecutor's closing argument at trial but asks this court to review the arguments under the plain error doctrine.

> "[I]t is defendant who bears the burden of persuasion on this issue. [P]lain-error analysis requires the same kind of inquiry as does harmless-error review. In both instances the crucial issue is

> whether the error is so substantial that it undermines our confidence in the jury verdict. *** [W]here, as here, the defendant has failed to make a timely objection, a plain-error analysis applies and it is the defendant rather than the [State] who bears the burden of persuasion with respect to prejudice. [Citations.]" *People v. Johnson*, 218 Ill. 2d 125, 141-42 (2005).

¶ 57 The State responds defendant cannot meet his burden of establishing plain error because no error occurred. The State argues the prosecutor's comments were in response to defense counsel's suppositions during his opening statement about the victim's motivations and, regardless, were proper comments on the victim's demeanor at trial and reasonable inferences from the evidence. That evidence included the victim's own testimony as to her fear during the attack and police officers' descriptions of the victim when they arrived as upset, crying, trembling, shaking, and distraught.

> "It is well established that the prosecutor is afforded wide latitude in closing argument and may argue to the jury facts and reasonable inferences drawn from the evidence. [Citations.] It is, however, improper for the prosecutor to argue assumptions or facts not based upon the evidence in the record. [Citation.] *** Improper remarks warrant reversal only where they result in substantial prejudice to the defendant, considering the content and context of the language, its relationship to the evidence, and its

> effect on the defendant's right to a fair and impartial trial." *People v. Kliner*, 185 Ill. 2d 81, 151 (1998).

¶ 58 We find that defendant has failed to meet his burden of persuasion with respect to prejudice. *Johnson*, 218 Ill. 2d at 141-42.

> "[A]ny statement must be considered in the context of the closing argument as a whole [citation], and [a] reviewing court will find reversible error based upon improper comments during closing arguments only if a defendant can identify remarks of the prosecutor that were both improper *and* so prejudicial that real justice [was] denied or that the verdict of the jury may have resulted from the error. [Citations.]" (Emphasis added and internal quotation marks omitted.) *Johnson*, 218 Ill. 2d at 141-42.

¶ 59 The complained-of elements of the prosecutor's closing argument were not based on expert psychological testimony about the effects of these events on this victim; however, she did testify that during the rape kit, she "was trying to make it seem like it wasn't really happening." The victim also testified that when she spoke to defendant and he apologized, she told him that she cannot forget what happened because this event is "going to mess me up, pretty much, for, like, a long time, which it has." She then described her difficulties sleeping, and reliving of the assault. "It is improper for the prosecutor to argue assumptions or facts not based on the evidence, or to present to the jury what amounts to his own testimony." *People v. Rivera*, 277 Ill. App. 3d 811, 821 (1996). However, the argument can reasonably be construed as asking the jury

to infer that the victim had "withdrawn into her own shell" and that she minimized the event as a coping mechanism based on the jury's common sense and intelligence about the possible effects of such an event on a young girl. "[J]urors can use their own common sense and experience in life." *People v. Allen*, 376 Ill. App. 3d 511, 525 (2007). We do not need to decide on which side of this line the argument in this case falls, because even if the prosecutor's remarks were improper, reversal is not warranted because those remarks were not "highly prejudicial." *Id*. at 823.

¶ 60 If the State was attempting to bolster the victim's credibility by arguing that her demeanor on the stand actually supported her testimony that all 3 men sexually assaulted her, then the State failed. The jury acquitted defendant on the bulk of the charges, only finding him guilty based on accountability based on the conduct of another. As we have previously noted, a reasonable explanation for the jury's verdict is that it believed defendant's testimony that his sexual encounter with the victim was consensual and did not believe the victim's testimony to the contrary. Defendant's argument that had the jury not heard the prosecutor's allegedly improper comments it would have concluded the victim suffered no trauma and found defendant not guilty based on accountability for Dillon does not persuade us that the verdict would not have been the same had the remarks been omitted. See *Johnson*, 218 Ill. 2d at 143. Although defendant argues that the improper argument was thematic, considering the closing argument as a whole in light of the jury's verdict, we do not find that defendant suffered any prejudice.

¶ 61 Immediately after the prosecutor stated that the victim still blames herself because she suffers from low self esteem, the prosecutor described how defendant started grabbing her

breasts, the victim told them to stop, and they did not. The prosecutor then described the victim's testimony as to how defendant pushed her back down, and the sexual assault proceeded. In short, the prosecutor repeatedly attempted to explain the victim's demeanor in the context of her testimony regarding defendant's conduct, for which the jury found defendant not guilty. Defendant argues the jury may have credited the victim's testimony that defendant aided Dillon in his sexual assault because of the prosecutor's argument that her demeanor can be explained by the fact the victim is now clearly traumatized from an assault. In light of the prosecutor's comments explaining the victim's demeanor as it related to her testimony regarding defendant's conduct, and the jury's verdict, we do not find that the jury would have acquitted defendant for Dillon's conduct had the jury not heard those comments. If the prosecutor's comments had such a persuasive effect on the jury, it likely would have convicted defendant for his own conduct as well. Accordingly, we hold that the State did not commit reversible error in closing argument. *People v. Sutton*, 316 Ill. App. 3d 874, 893 (2000) ("While a prosecutor may not make arguments or assumptions which have no basis in evidence, improper comments or remarks are not reversible error unless they are a material factor in the conviction or cause substantial prejudice to the accused.").

¶ 62 CONCLUSION

¶ 63 For all of the foregoing reasons, the trial court's judgment is affirmed.

¶ 64 Affirmed.