No. 2—09—0348
Order filed February 18, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 08—CM—1628
JUAN NOVA-RAMIREZ,	)	Honorable Gordon E. Graham,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Bowman and Zenoff concurred in the judgment.

ORDER

Held: The victim's statements to the 911 dispatcher were non-testimonial in nature and qualified as a spontaneous declaration; defendant forfeited the argument regarding the trial court's failure to comply with Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)) during the jury *voir dire*; affirmed.

Following a jury trial, defendant was found guilty of domestic battery and sentenced to an 18-month term of conditional discharge. The victim reported the incident to a 911 dispatcher, but the victim did not testify at trial. The trial court allowed the victim's 911 statements to be heard by

the jury. Defendant timely appeals, arguing that the 911 statements were testimonial in nature and when the declarant did not testify the statements were admitted in violation of the confrontation clause or qualify as a spontaneous declaration, and the trial court denied his right to a trial by an impartial jury for failing to comply with Supreme Court Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. May 1, 2007)) during *voir dire.*

BACKGROUND

The following facts are derived from the trial transcripts. Defendant's wife, Irma Hernandez-Calixto, called a 911 dispatcher about 7 a.m. on June 21, 2008, to report that defendant had attacked her. Irma told the 911 dispatcher, Michelle Alfonso, that the attack took place around 5:30 a.m. Subsequently, defendant was charged by complaint with the offense of domestic battery (720 ILCS 5/12—3.2(a)(2) (West 2008)). Irma did not testify at defendant's trial. Both the dispatcher and Officer Lara, who was dispatched to investigate the complaint, testified for the State. The jury heard the 911 call and saw photographs of Irma, which were taken by Lara between 7:30 and 8:00 a.m.

Lara testified first for the State. He was dispatched to investigate a domestic battery complaint about 7 a.m. Lara arrived around 7:07 a.m. and spoke with Irma for approximately 25 minutes. Irma cried periodically during that time and Lara noticed red marks on Irma's face. She also had scratch marks on her forehead and nose, which were bleeding. Lara took photographs of Irma's injuries between 7:30 and 8:00 a.m. Lara stated that the photographs were a fair and accurate depiction of Irma on that day. Defendant had no objection to admitting the photographs into evidence.

The prosecutor asked if Irma mentioned why she did not call the police until 7 a.m. Over defendant's objection, Lara related that Irma told him that she did not call earlier because she waited

for defendant to leave for work. Irma also told Lara that her cell phone needed to be charged slightly and she could not remember the number for the police because she was frustrated and upset. Lara believed that Irma was not thinking clearly.

Lara called Irma later that day to inquire whether defendant had returned home. Irma told Lara that defendant was across the street, and she described defendant. Lara found defendant in a garage across from the residence, based on Irma's description, with three other Hispanic males. Defendant was drinking what appeared to be a beer. Lara smelled alcohol on defendant's breath, but defendant's demeanor was calm and cooperative. Defendant identified himself. After advising defendant that he was under arrest for domestic battery and being placed in custody, defendant asked Lara if his arrest had something to do with the incident with his wife early in the morning.

Lara testified that Irma's sister-in-law and two children were at the residence with Irma, but her sister-in-law was present at one point during his interview of Irma. Lara thought the children were about one and two years' old, respectively.

Alfonso, the 911 dispatcher, testified that she received a 911 call at approximately 7 a.m. on June 21, 2008, and the caller stated her name was Irma Hernandez. The call was in Spanish, which Alfonso speaks fluently. Alfonso stated that her sole intent when questioning a 911 caller is to gather information to advise the responding officer of the circumstance he or she might encounter. Alfonso identified the State's copy of the 911 tape as a fair and accurate recording of her conversation with Irma.

The State moved to have the 911 tape played to the jury and argued, after the trial court dismissed the witness and the jury, that the recording should be admitted as a spontaneous

declaration exception to hearsay. Defendant argued that, because Irma took 90 minutes to report the alleged abuse, it allowed her time to fabricate her statements.

The trial court disagreed with defendant, finding the time between the incident and the complaint fairly prompt given the evidence presented at trial. The court observed that Irma had waited until defendant left the house before she called, and "[defendant] could have been out the door within two minutes, but that's all speculative. We don't know that." The court observed that the scratches on Irma's face were still bleeding when Lara interviewed her within minutes of the 911 call.

Before playing the 911 recording to the jury, the court cautioned that it found a certain portion to be improper and ordered that section deleted. The 911 tape was played for the jury, which was translated simultaneously. In the 911 tape, Alfonso asked Irma if she could help, where was she at the moment, what was her name, address, and phone number, when her husband hit her, and if she would be there for a while. Irma identified herself and responded to the other questions. She told Alfonso that her husband, Juan Nova, came toward her head with a pair of scissors in the middle of the night while she was in bed with her two sons. Irma related that defendant did something to her head with a pair of scissors. Although it is not clearly discernible on the tape, it is apparent from the photographs that Irma had injuries to her face.

Following closing arguments, the jury found defendant guilty beyond a reasonable doubt of domestic battery. The trial court sentenced defendant to an 18-month term of conditional discharge. Defendant filed a posttrial motion. In addition to raising the hearsay objection, defendant argued that the 911 statements were testimonial in nature and should have been excluded under the sixth

amendment right to confrontation. Defendant timely appeals following the trial court's denial of his posttrial motion.

ANALYSIS

Non-testimonial Statements

We first address whether the 911 tape contains testimonial statements triggering confrontation-clause protections. Because this is a question of law, we review the issue *de novo*. *People v. Dominguez*, 382 Ill. App. 3d 757, 764 (2008); People *v. Melchor*, 376 Ill. App. 3d 444, 451 (2007).

The Supreme Court modified its confrontation-clause analysis, abandoning a reliability analysis and adopting a "testimonial" analysis. In *Crawford v. Washington*, 541 U.S. 36, 40 (2004), the Supreme Court considered a conviction that was based largely on statements the defendant's wife made during an interview while in police custody. The defendant's wife did not testify at his trial because she invoked the spousal privilege. *Crawford*, 541 U.S. at 40. Following an historical analysis of the confrontation clause's purpose, the Court concluded that (1) the clause was particularly directed at preventing the use of *ex parte* examinations as evidence against the accused, and (2) testimonial statements of witnesses absent from trial may be admitted only where the declarant is unavailable and the defendant has had a prior opportunity to cross-examine. *Crawford*, 541 U.S. at 50, 53-54. The Court held that the statements made by the defendant's wife to the police were testimonial. *Crawford*, 541 U.S. at 68. However, the Court declined to comprehensively define what constituted "testimonial." Instead, it limited its holding to at minimum "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations," as

those practices are most akin to the abuses at which the clause was directed. *Crawford*, 541 U.S. at 68.

The Supreme Court revisited the definition of "testimonial statements" in *Davis v. Washington*, 547 U.S. 813 (2006). In *Davis*, the Court considered testimonial statements in two companion cases. The first case involved a victim of a domestic disturbance, Michelle McCottrey, who made statements to a 911 operator. *Davis*, 547 U.S. at 817. During the conversation, McCottrey reported the defendant's name, that he was in the home, and that he was using his fists. *Davis*, 547 U.S. at 817. McCottrey eventually reported that the defendant ran out of the house and was leaving in a car with someone else. The 911 operator then posed a series of questions to gather information about the defendant. *Davis*, 547 U.S. at 818. McCottrey did not testify at the defendant's trial, and the trial court allowed into evidence the portion of the 911 tape in which she identified the defendant, concluding that it was not testimonial. *Davis*, 547 U.S. at 819.

The second case involved another victim of a domestic disturbance, Amy Hammon, who made statements to the police after they responded to a report of a disturbance at the home. *Davis*, 547 U.S. at 819. The police arrived at the scene to find Hammon sitting on the front porch and the defendant inside the home with broken glass and a gas heating unit engulfed with flames. *Davis*, 547 U.S. at 819. The police spoke to Hammon apart from the defendant, and she signed an affidavit, but she did not testify at the trial. *Davis*, 547 U.S. at 820.

The Supreme Court held that McCottrey's 911 taped statements were not testimonial but Hammon's statements to police were. *Davis*, 547 U.S. at 829. Again, the Court declined to provide a list of all statements that might conceivably be regarded as "testimonial." However, it applied a primary-purpose test to distinguish the two statements there from the wife's statements in *Crawford*.

The Court specifically disregarded any distinction between police and 911 operators and held that, for analytical purposes, 911 operators were law enforcement agents. *Davis*, 547 U.S. at 823 n. 2. The Court observed that the primary purpose of McCottrey's statements was to "describe current circumstances requiring police assistance" and not to establish or prove some past fact. *Davis*, 547 U.S. at 827. Comparing *Davis* and *Crawford*, the Court stated that "any reasonable listener would recognize that McCottrey (unlike Sylvia Crawford) was facing an ongoing emergency," that McCottrey was describing events as they were actually happening, and that the elicited statements were necessary to resolve the present emergency rather than simply to learn about past events. *Davis*, 547 U.S. at 827. Moreover, there was a noticeable difference in the level of formality involved in the *Crawford* police interrogation, which was held at the police station after the defendant's wife was given *Miranda* warnings, and McCottrey's frantic phone call. *Davis*, 547 U.S. at 830. Accordingly, McCottrey's identification of the defendant to the 911 operator was not considered testimonial. *Davis*, 547 U.S. at 829. The Court cautioned, however, that a statement that began with a primary purpose of resolving an emergency could evolve into a testimonial statement and that some statements may require redaction. *Davis*, 547 U.S. at 828-29.

Conversely, Hammon's statements were elicited under conditions similar to those in *Crawford*. The Supreme Court determined that Hammon's emergency was over by the time the police arrived, and the primary purpose of Hammon's interrogation was to investigate past events. *Davis*, 547 U.S. at 830. Additionally, Hammon initially said that things were fine, and the police continued to question her, eventually separating her from the defendant to continue asking her questions. *Davis*, 547 U.S. at 830. Thus, the court viewed Hammon's statements as testimonial. *Davis*, 547 U.S. at 830.

In *People v. Stechly*, 225 Ill. 2d 246, 280-81 (2007), the Illinois Supreme Court formed an analysis of testimonial evidence, set forth by the Supreme Court, into a two-component test derived from the definition of "testimony," as "solemn declarations for the purpose of establishing or proving some fact germane to the defendant's prosecution." Thus, the court held that statements must be (1) made in a solemn fashion and (2) intended to establish a particular fact. *Stechly*, 225 Ill. 2d at 281-82. When examining solemnity, the United States Supreme Court was divided: the majority in *Davis* believed solemnity was established by the potential consequences of lying to a police officer. The dissent believed it was established if the statements were made in a setting with a higher degree of formality and possibly including *Miranda* warnings. *Stechly*, 225 Ill. 2d at 281-82. Regardless, when examining the intent of a statement made to the police or an agent of the police, the "focus is on whether *** the witness was acting in a manner analogous to a witness at trial, describing or giving information regarding events which had previously occurred." *Stechly*, 225 Ill.2d at 282. Additionally, the focus must be on the intent of the questioner in eliciting the statement and not on the intent of the declarant. *Stechly*, 225 Ill.2d at 284-85. We must rely on the objective circumstances surrounding the statement and not on testimony regarding the questioner's subjective intent. *Stechly*, 225 Ill.2d at 285.

In *Dominguez,* we applied the test set forth in *Stechly*. We found that the statements on the 911 tape were non-testimonial and concluded that any reasonable listener of the 911 tape would conclude that the victim was facing an ongoing emergency and was describing events as they were unfolding. *Dominguez*, 382 Ill. App. 3d at 767. While her injuries may have occurred during the overnight hours, we noted that the victim did not become aware of her injuries until she was able to break away from the defendant and enter her vehicle. *Dominguez*, 382 Ill. App. 3d at 767-68. We

further ascertained that the victim's conversation with the 911 operator was not calm, formal, or controlled; it "was more akin to McCottrey's frantic call in *Davis*." *Dominguez*, 382 Ill. App. 3d at 768. We observed that the victim was crying and hysterical, as the operator attempted to gather details on the current circumstances, that required the assistance of the police. We found the operator's intent was to determine where the police should be dispatched and what potential threat the victim or the police might be facing because the operator elicited from the victim why the victim was fleeing the defendant, what her injuries were, where she was located, and where she left the defendant. *Dominguez*, 382 Ill. App. 3d at 768.

When applying *Davis, Stechly*, and *Dominguez* to the facts in this case, we find that the statements made on the 911 tape were not testimonial in nature. The call was not made in a solemn fashion, as "any reasonable person" listening to Irma would conclude that the conversation she was having with the 911 dispatcher was not calm, formal, or controlled. Irma clearly was crying and upset. Irma's statements were not made in a controlled or formal setting. Further, her statements were not made for the purpose of investigation. Rather, the dispatcher was gathering sufficient information to send an officer to the scene of an alleged domestic disturbance. The dispatcher's intent was to gather information to advise the responding officer of the circumstances he might encounter upon arrival at the scene. Although Irma postponed the 911 call, Irma could not call earlier because she had to wait for defendant to leave for work. Moreover, while Irma stated that the attack occurred 90 minutes before she called 911, the evidence suggests that the emergency was ongoing. Lara observed red marks on Irma's face and scratches, which were still bleeding when he arrived within minutes of her call.

Defendant contends the trial court erred in allowing Officer Lara's testimony concerning Irma's responses as to why she waited 90 minutes to report the attack. Defendant asserts that this testimony clearly was testimonial. Defendant's posttrial motion pertained strictly to the testimonial nature of the statements on the 911 tape. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) ("failure to raise an issue in a written motion for a new trial results in a waiver of that issue on appeal"). Moreover, even if defendant raised this argument before the trial court, defendant does not set forth any basis on appeal for his conclusion that the trial court erred in admitting this statement. Thus, the argument is forfeited for lack of support in this court. 210 Ill.2d R. 341(h)(7). "A reviewing court is entitled to have the issues before it clearly defined and is not simply a repository in which appellants may dump the burden of argument and research; an appellant's failure to properly present his own arguments can amount to waiver of those claims on appeal." *People v. Chatman*, 357 Ill. App. 3d 695, 703 (2005).

Spontaneous Declaration

Regardless of the non-testimonial nature of the 911 statements, we must still address defendant's argument that the trial court abused its discretion when it determined that the 911 statements constituted an "excited utterance" or "spontaneous declaration" and admitted the statements under that exception to the hearsay rule.[1] Although the confrontation clause places no restriction on non-testimonial statements, the statements are "still subject to traditional limitation upon hearsay evidence." *Stechly*, 225 Ill. 2d at 279.

[1]Defendant does not contend in this argument on appeal that the trial court abused its discretion by admitting Irma's statements to Officer Lara. Rather, defendant's arguments relate solely to Irma's statements to the 911 dispatcher.

A recognized exception in hearsay jurisprudence is the spontaneous declaration or excited utterance. *People v. Sutton,* 233 Ill. 2d 89, 107 (2009)*;People v. Williams*, 193 Ill. 2d 306, 352 (2000). The admissibility of such an exclamation requires that (1) there must have been an occurrence that was sufficiently startling to produce a spontaneous and unreflecting statement, (2) there must have been an absence of time between the occurrence and the statement for the declarant to fabricate the statement, and (3) the statement must relate to the circumstances of the occurrence. *Sutton*, 233 Ill. 2d at 107; *Williams*, 193 Ill. 2d at 352. Courts use a totality-of-the-circumstances analysis to decide whether a hearsay statement is admissible under the spontaneous-declaration exception. *Williams*, 193 Ill. 2d at 352. This involves considering several factors, including the passage of time, the declarant's mental and physical condition, the nature of the event itself, and whether the statement is in the declarant's self-interest. *Sutton*, 233 Ill. 2d at 107. The time that may pass without affecting the admissibility of a statement varies greatly; the critical inquiry is whether the statement was made while the excitement of the event predominated. *Sutton*, 233 Ill. 2d at 107. No one factor is determinative and each case must rest on its own facts. *People v. Gwinn*, 366 Ill. App. 3d 501, 517 (2006). Whether a statement qualifies as an excited utterance is within the trial court's discretion. *Gwinn*, 366 Ill. App. 3d at 517. 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).

Defendant contends that Irma could not have been startled and alarmed by the alleged attack and had ample time to fabricate a story, having not called 911 for 90 minutes after the event took place. Defendant points out several reasons for his position, including that Irma specifically told the dispatcher that the alleged abuse happened at 5:30 a.m. and that the "intervening circumstance of the

presence of the unidentified woman who was at the apartment with Irma when the police arrived" destroyed the spontaneity of any statement. See *People v. Sephus*, 150 Ill. App. 3d 272, 274-75 (1986) (finding that, because the victim spoke to another individual about the incident prior to speaking to her mother, it destroyed the spontaneity of any statement to her mother). Defendant acknowledges that Officer Lara observed red marks and scratches on her face, but defendant maintains that Irma was not seriously injured. Defendant further maintains that, although Irma might have been upset recounting an unpleasant past event, being upset does not equate to being startled or alarmed such that she lacked time to fabricate.

While being upset might not signify that a person is alarmed, in this case, the trial court found that Irma was emotional when she recounted the abuse during her conversation with the dispatcher. We find the trial court did not abuse its discretion in concluding that the hearsay statements constituted a spontaneous declaration in light of the evidence surrounding the circumstances. We reviewed the tape and determine that the trial court's factual finding that Irma was emotional during the 911 call was not against the manifest weight of the evidence. See People v. Calhoun, 382 Ill. App. 3d 1140, 1148 (2008) (appellate court viewed the same DVD as the trial court and concluded that the trial court's finding that there was no indication that the defendant understood his *Miranda* warnings was against the manifest weight of the evidence). As she did on the recording, Irma cried periodically when she spoke with Officer Lara; and reiterated to Officer Lara that she did not call 911 until defendant left for work.

Simply because another individual was at the apartment or that 90 minutes transpired between the time of the occurrence and the time Irma related the incident to the 911 dispatcher does not establish that the 911 statements were not spontaneous. No evidence suggests that Irma was

influenced by the individual when Irma called 911. In fact, Officer Lara believed that Irma did not appear to be thinking clearly. In any event, whether another person was present or time elapsed is not controlling, as a court must decide from the entirety of the surrounding circumstances whether there was an opportunity for reflection and invention. See *People v. Ikpoh*, 242 Ill. App. 3d 365, 389 (1993) (although elapsed time is material in determining spontaneity, it is not controlling). The supreme court has held that "we do not require the time between when the startling event occurs and when the declarant makes statements in response to that event to be contemporaneous." *People v. Smith*, 152 Ill. 2d 229, 259-60 (1992). Long periods of time between the event and the statements have been held not to destroy spontaneity. See, *e.g., Ikpoh*, 242 Ill. App.3d 365, 389 (1993) (one hour). The critical inquiry is whether the statement was made while the excitement of the event predominated. *People v. Burton*, 399 Ill. App. 3d 800, 816 (2010).

In this case, the trial court was not convinced that the attack itself actually took place 90 minutes before Irma called 911. The judge stated: "We can surmise that it's an hour and a half, but I don't know how we ever get to that idea based upon the evidence." The court observed that defendant could have been gone within two minutes but that was just as speculative. Of significance here is that Irma told Officer Lara that she had to wait until defendant left to call 911, and even if the time frame was more than an hour, Irma's complaint must have been fairly prompt after the abuse because Irma was still bleeding when the officer arrived within minutes of her 911 call. The photographs of Irma's face, taken by Officer Lara around 7:30 to 8:00 a.m. and admitted without objection, depict cuts and smeared blood that appear to be fresh. Under these circumstances, we cannot say the trial court's conclusion that the excitement of the event predominated, lacking the opportunity for reflection and invention, was unreasonable. Looking at the evidence as a whole, we

determine that the trial court acted within its discretion in admitting the 911 tape as a spontaneous declaration exception to hearsay.

Supreme Court Rule 431(b)

We now turn to the final issue. Defendant contends that he was denied his right to a trial by an impartial jury because the trial court failed to comply with Supreme Court Rule 431(b) during jury *voir dire*. Defendant acknowledges that he did not contemporaneously object or include the issue in a posttrial motion and that this normally results in forfeiture of the issue. *Enoch*, 122 Ill. 2d at 186-88. However, defendant contends that the issue is reviewable for plain error. See *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005) (reviewing court may consider a forfeited error under the plain-error rule when "the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence" or when "the error is so serious that the defendant was denied a substantial right, and thus a fair trial"). Defendant recognizes that, pursuant to the supreme court's recent holding in *People v. Thompson*, 238 Ill. 2d 598, 614-15 (2010), he is foreclosed from arguing that the error was so serious that he was denied a substantial right under the second prong of plain-error review. Instead, defendant argues plain error under the first prong, requiring a finding that the evidence is so closely balanced that the guilty verdict may have resulted from the error. The State concedes the trial court did not comply with Rule 431(b) but counters that the evidence was not closely balanced.

The evidence at trial established that Irma placed a 911 call at approximately 7 a.m. in which she related that defendant had attacked her with a pair of scissors and hit her in the face and head. The officer dispatched to the scene arrived within minutes of the 911 call. The properly admitted 911 call regarding the attack was corroborated by the officer's testimony describing Irma's injuries

and her demeanor at the scene, the photographs depicting her injuries, and defendant's statement upon being apprehended. We agree with the State that the evidence was not closely balanced. Accordingly, defendant's argument is forfeited.

CONCLUSION

For the preceding reasons, the judgment of the circuit court of McHenry County is affirmed.

Affirmed.