No. 3-09-0641

Order filed February 15, 2011 .

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 21st Judicial Circuit Kankakee County, Illinois,
Plaintiff-Appellee,	)	
v.	)	No. 08-CF-794
AARON M. MINZGHOR,	)	The Honorable Kathy Bradshaw-Elliott,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE McDADE delivered the judgment of the court.
Justice Schmidt concurred in the judgement.
Justice Wright specially concurred.

ORDER

Held: Where the trial court admitted statements by the victim made two days after the alleged offense, but the evidence supported a finding that the victim was still under the excitement of the event when the statements were made, the trial court did not abuse its discretion in admitting the statements under the excited utterance exception to the hearsay rule.

The State charged defendant, Aaron M. Minzghor, with criminal sexual assault.

Following a bench trial, the circuit court of Kankakee County found defendant guilty, sentenced

him to five years' imprisonment, and imposed fines. For the reasons that follow, we affirm.

BACKGROUND

The victim of the alleged offense is Lisa O., defendant's 21 year old cousin. Lisa has learning disabilities and is mildly mentally retarded. On the date of the offense, a Friday, Lisa was at defendant's home. Defendant's wife had picked Lisa up, taken her to their home, and then gone to work. Lisa stayed at the home with the couple's three children, bathed them, and put them to bed. Defendant returned to the home at approximately 10 p.m.

Lisa testified that defendant was drunk when he returned home that evening. He took a beer to his bedroom and returned a short time later. Lisa testified that when defendant came out of his bedroom, he was under the influence of crack cocaine. Defendant sat on a couch with Lisa for a short time, then Lisa left to go to the kitchen. Defendant followed and retrieved an empty pop can. The can had ashes on it. Defendant told Lisa the ashes were marijuana and asked her to smoke it. She refused. Lisa testified that defendant then held her against a wall and made her smoke the ashes on the can. Her heart began to race.

Lisa and defendant returned to the couch. Defendant asked her to take off her clothes. She refused. Lisa testified that defendant then got on top of her, put his elbow on her chest, and removed her clothing. He then placed his fingers insider her vagina for approximately five minutes. Lisa testified that she tried to escape but could not. She kicked her feet but could not get away. Defendant removed his clothes. The assault ended when they heard defendant's wife returning home. Lisa retreated to the bedroom and replaced her clothing. Defendant spoke to his wife, then went to sleep. His wife also went to sleep. Lisa lay on the couch but could not sleep. Her heart continued to race.

Lisa tried to talk to defendant's wife, but she was mad at Lisa. Lisa had to walk home, whereupon she went to the hospital because she felt her blood pressure was elevated. The hospital treated and released her. Lisa testified that while at the hospital, she was afraid because defendant warned her not to tell anyone or he would beat her up. Lisa did not tell anyone. She went to work the following Monday where she told her brother's girlfriend, who worked with her, what had happened.

Nicole Bessieres is Lisa's brother's girlfriend, and works with Lisa at United Development Services. United is a sheltered workshop for the mentally handicapped. Nicole noticed that Lisa seemed upset. Lisa asked Nicole if she could stay with her and her brother. Nicole asked Lisa why she was upset, and why she wanted to stay with them. Lisa told Nicole about the incident with defendant. Nicole reported the incident to Lisa's brother and father. Later, Nicole took Lisa to police. The trial court permitted Nicole to relay what Lisa told her about the incident under the excited utterance exception to the hearsay rule. Over a defense objection, Nicole testified at the trial that, when Lisa told her about the incident, she said that defendant had hurt her and had "done stuff with her that only a husband would do with a wife." Lisa told Nicole that defendant had put his fingers inside of her. Nicole testified that Lisa started and stopped crying throughout their conversation.

Defendant's wife testified on his behalf. She said that she, defendant, and Lisa all smoked a joint together before she went to work. When she returned, defendant was asleep and Lisa was sitting in a chair. She testified they all smoked another joint after she returned from work.

A Kankakee Police Department detective testified that Lisa told him that she did not do

drugs, and that she was screaming and struggling with defendant while he assaulted her.

Defendant testified that after his wife went to work, he and Lisa stayed with the children. He and Lisa also drank beer and smoked marijuana together. He testified that Lisa was upset that she was unable to play a video game as promised. Defendant testified that he went to sleep. When his wife returned, she asked him to roll a joint. He did, and he, his wife, and Lisa smoked it. He then went back to sleep. He denied being on the couch with Lisa, undressing her, or having any sexual contact with her.

The trial court found defendant guilty. Defendant filed a motion for a new trial arguing, *inter alia*, that the trial court erred in admitting Lisa's statements to Nicole as excited utterances. The trial court denied defendant's motion and sentenced him to five years' imprisonment. The court also imposed a $200 domestic violence fine.

This appeal followed.

ANALYSIS

Defendant appeals the trial court's denial of his motion for a new trial. The sole error claimed is that the court erroneously admitted and considered hearsay statements Lisa made to Nicole. The State argues that the decision to admit the statements was a matter of the trial court's discretion, and the court's decision was not an abuse of that discretion given the totality of the circumstances.

> "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) (quoting *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

Defendant argues that Lisa's statements to Nicole do not satisfy the excited utterance exception to the hearsay rule. Defendant asks this court to hold that the trial court abused its discretion in admitting the statements as excited utterances, that it impermissibly considered the hearsay statements during trial and, accordingly, to reverse his conviction and remand for a new trial.

> "For a hearsay statement to be admissible under the spontaneous declaration exception, there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement, there must be an absence of time for the declarant to fabricate the statement, and the statement must relate to the circumstances of the occurrence. [Citation.] Courts employ a totality of the circumstances analysis in determining whether a hearsay statement is admissible under the spontaneous declaration exception. [Citation.] The totality of the circumstances analysis involves consideration of several factors, including time, the mental and physical condition of the declarant, the nature of the event, and the presence or absence of self-interest. [Citations.]"
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> *People v. Sutton*, 233 Ill. 2d 89, 107-108 (2009).

Defendant argues that Lisa's statements to Nicole, two and a half days after the

occurrence, do not qualify as excited utterances given the length of time involved, as well as other circumstances surrounding the statements. In *People v. Van Scyoc*, 108 Ill. App. 3d 339, 341 (1982), the court wrote that:

> "some latitude exists as regards the permissible lapse of time between the event and the statement. The question is whether the statement was made while the excitement of the event predominated and the lapse of time is but one factor to be considered. [Citation.] [O]ther factors to be considered include the nature of the event, the condition of the declarant, the influence of intervening occurrences, and the presence or absence of self-interest." *Van Scyoc*, 108 Ill. App

Defendant argues that the State failed to prove an absence of time for Lisa to fabricate the statement. The other factors defendant notes are that Lisa did not tell anyone else of the incident closer in time to the occurrence despite the opportunity to do so, the very fact that Lisa went to work is evidence that Lisa was no longer upset or startled by the occurrence, and Lisa did not "blurt out" her statement. Rather, she responded to Nicole's questions.

The State responds the critical inquiry is whether the statement was made while the excitement of the event predominated. *Sutton*, 233 Ill. 2d at 108 ("The critical inquiry with regard to time is ' "whether the statement was made while the excitement of the event predominated." ' [citations]"). The State argues that in this case, the evidence supports finding that the excitement of the event predominated when Lisa made the statements in question.

Lisa testified that she did not tell anyone about the occurrence before Nicole asked her why she was upset because she was scared. Nicole testified about Lisa's demeanor at work. Lisa

had independently asked Nicole about staying with her and her brother for two weeks. Nicole then asked why, and Lisa told Nicole that she was afraid to be at home. Nicole asked her why, and why she was crying. Lisa's response was that she was afraid that defendant would come to her house and told her about the incident.

Defendant cites *People v. Jacobs*, 51 Ill. App. 3d 455, 458 (1977), as precedent for his argument that the fact Lisa failed to tell anyone about the occurrence sooner establishes that her statements about the occurrence do not qualify as excited utterances. In *Jacobs*, the court held that a child victim's statements to her mother and her mother's boyfriend about an alleged rape were not spontaneous declarations within the rule. *Jacobs*, 51 Ill. App. 3d at 458. The court did note that the child made no complaints about the defendant when her mother returned to the home where the defendant had been babysitting the alleged victim when the rape allegedly occurred. *Id.* The child said nothing and went home with her mother. The court noted that "[e]ven after arriving home the child said nothing. It was not until [the mother's] boyfriend noted [a] hickey and began to ask questions that she told the story." *Id.* However, the court noted that "[t]he fact that the declaration comes in response to an inquiry does not automatically exclude it from the exception." *Id.*

Jacobs does not support defendant's contention that Lisa's failure to speak sooner destroys the spontaneous nature of her statements to Nicole within the meaning of the rule. The *Jacobs* court did not rely on the fact the child failed to speak sooner. In *Jacobs* the critical question was the declarant's demeanor. The court held that "it seems clear that the child's demeanor was not excited enough to qualify." *Jacobs*, 51 Ill. App. 3d at 458. See also *People v Lisle*, 376 Ill. App. 3d 67, 77 (2007) ("a declarant may make a spontaneous declaration to a

person even after having spoken previously to another").

Defendant's argument that the evidence proves that Lisa was no longer upset by the occurrence because she went to work the following Monday relies on an inference about the facts and implicitly attacks the credibility of the witnesses. The fact is that Lisa did go to work that Monday. Lisa testified that Monday, at work, she told Nicole that she was scared to stay in Kankakee and asked to stay with Nicole for a couple of weeks. Nicole testified that Lisa told her she was afraid defendant would come to her house and that he had hurt her. Nicole also testified that Lisa appeared upset. Nicole's testimony does not support defendant's inference that Lisa became upset when Nicole asked her about the occurrence. Nicole's testimony was that Lisa appeared upset, she asked her why, and they then had a conversation about why Lisa was upset.

Defendant's argument implicitly asks us to discredit the testimony that Lisa was upset, and to infer from the fact that she was at work that she was not upset.

> "Determinations regarding the credibility of the witnesses, the weight to be given their testimony, and the reasonable inferences to be drawn from the evidence are the responsibilities of the trier of fact. [Citations.] Therefore, as a court of review, we do not reweigh the evidence or substitute our judgment for that of the trier of fact." *People v. Parks*, 403 Ill. App. 3d 451, 457 (2010).

The trial court did *not* infer that Lisa was not still upset by a criminal sexual assault that occurred on a Friday because she was able to go to work on a Monday. The court accepted Lisa's testimony that she was still upset by the incident on Monday, so much so she wanted to leave town, and Nicole's testimony that Lisa's demeanor was that she appeared upset, was

unusually quiet, and was crying. Defendant has not directly attacked their credibility as witnesses, and the inference that Lisa was still upset by the occurrence is a reasonable one. Finally, as the State notes, the court has held that " 'the fact that a statement was made in response to a question does not necessarily destroy spontaneity.' [Citations.] No one factor is dispositive." *Lisle*, 376 Ill. App. 3d at 78 (quoting *People v. Williams*, 193 Ill. 2d 306, 353 (2000), citing *People v. Smith*, 152 Ill. 2d 229 (1992)).

When the defense objected to the trial court's admission of Lisa's statements, the trial court ruled that it "believe[d] it's all an exception under excited utterance based on the description of [Lisa's] demeanor." Later, in ruling on defendant's posttrial motion, the trial court stated that it would stand on its ruling, based in part on Lisa's mental condition, but because of "how it occurred at the sheltered workshop." The trial court recounted the testimony that "how this occurred as I remember was that it was during a break and Lisa was in the bathroom, I believe, and she was upset, and crying, and Nicole then asked her what's wrong."

The trial court then considered the law applicable to excited utterances. The court noted, correctly, that, "the case law doesn't say that it doesn't come in as an excited utterance if there's a question asked. *** Timewise the cases are kind of all over the place, from hours to days as for the time that can pass." See *Sutton*, 233 Ill. 2d at 107 ("The period of time that may pass without affecting the admissibility of a statement varies greatly"). Our supreme court has held that "[t]he critical inquiry with regard to time is ' "whether the statement was made while the excitement of the event predominated." ' [Citations.]" *Sutton*, 233 Ill. 2d at 107.

Defendant does not dispute the trial court's recollection of the evidence. The testimony is consistent with the trial court's view of the evidence and provides a reasonable basis to admit

Lisa's statements to Nicole even though the statements came two and a half days after the occurrence. Lisa's testimony was that she did not tell anyone sooner because she was afraid. She was afraid of defendant because he told her he would beat her up if she told anyone about the incident. Nicole testified that when she noticed Lisa at work on Monday, she appeared upset, was uncharacteristically quiet, and was crying. The evidence supports a reasonable finding that the excitement of the event predominated when Lisa made the statements at issue. The record clearly reflects that the trial court considered the testimony and applied the law.

We find no abuse of discretion in the trial court's decision to admit the statements at issue as excited utterances. Accordingly, defendant's conviction is affirmed. Defendant also asked this court to award him monetary credit for time spent in presentence custody against his $200 domestic violence fine. The State agrees that the trial court erroneously failed to award defendant credit against the fine for time spent in presentence custody. "Under Supreme Court Rule 615(b)(1), this court has the authority to order a correction of the mittimus." *People v. McNeal*, ___ Ill. App. 3d ___, ___ (No. 1-08-2267 September 30, 2010) (citing 134 Ill. 2d R. 615(b)(1)). We order the clerk of the circuit court to correct the mittimus to reflect a credit of $200 toward the domestic violence fine, reducing defendant's domestic violence fine to $0.

CONCLUSION

The judgment of the circuit court of Kankakee County convicting defendant of criminal sexual assault is affirmed and the mittimus is corrected as ordered.

Affirmed, mittimus corrected.

JUSTICE WRIGHT, specially concurring:

I specially concur simply to emphasize that the declarant was developmentally delayed and was employed at a facility for persons with similar disabilities. When the declarant reported to work on her first work day following the incident, another person who worked with the declarant in this sheltered environment, noticed the declarant was uncharacteristically withdrawn and fearful.

Without any reason to suspect the declarant had been the victim of a criminal assault, her co-worker asked a very general, non-suggestive, question regarding the declarant's well being. The co-worker's question clearly precipitated an unexpected visceral reaction in the declarant and triggered an ensuing emotional response to the question. Based on these circumstances, I agree the declarant did not have time to reflect upon the contents of her response or to fabricate the details she related to her concerned friend and co-worker. Therefore, I agree the trial court did not abuse its discretion by admitting the testimony of the co-worker under the excited utterance exception to the hearsay rule.