2013 IL App (3d) 120081-U

Order filed October 16, 2013

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IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2013

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) Appeal from the Circuit Court<br>) of the 21st Judicial Circuit,<br>) Kankakee County, Illinois, |
| Plaintiff-Appellee, | ) |
| | ) Appeal No. 3-12-0081 |
| v. | ) Circuit No. 11-CM-720 |
| | ) |
| MONICA E. ELLIS, | ) Honorable<br>) Ronald J. Gerts, |
| Defendant-Appellant. | ) Judge, Presiding. |

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JUSTICE CARTER delivered the judgment of the court.
Justices Holdridge and O'Brien concurred in the judgment.

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**ORDER**

¶ 1 *Held:* In a bench trial for domestic battery, declarant's out-of-court statement that defendant threw hot grease on him: (1) was inadmissible under section 115-10.2a of the Code of Criminal Procedure of 1963 because declarant was not unavailable; and (2) was admissible as an excited utterance under Illinois Rule of Evidence 803(2).

¶ 2 After a bench trial, defendant, Monica E. Ellis, was convicted of domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2010)) and sentenced to 24 months' probation. During trial, the responding officer testified that the victim said that defendant threw hot grease on him. The trial

court overruled defendant's objection to the statement as inadmissible hearsay. Defendant appeals, arguing that the court erred in admitting the officer's testimony. We affirm the trial court's decision and find the statement admissible under the excited utterance exception to the hearsay rule. Ill. R. Evid. 803(2) (eff. Jan. 1, 2011).

¶ 3 FACTS

¶ 4 On June 23, 2011, police responded to the home of defendant and her husband, the victim, Willie Ellis. Responding officer Christopher Tolly observed burns on Willie's arm and neck. Defendant was arrested for domestic battery (720 ILCS 5/12-3.2(a)(1) (West 2010)) on the belief that she had caused the burns by throwing hot grease on Willie.

¶ 5 Defendant waived her right to a jury trial, and the case proceeded to a bench trial. Willie testified that on the night in question, he was at home drinking with defendant. The two began to argue, and Willie left the house to take a walk. When he returned home later that night, he saw police arriving at the house. The prosecutor asked Willie if he spoke with police and told them that defendant had thrown hot grease on him. Willie responded that he did not remember making a statement and could not remember the details of his interactions with police because he was highly intoxicated that night. Willie testified that he suffered burns earlier on the day in question when he was sprayed by hot radiator fluid while working on a car.

¶ 6 The only other witness to testify was Tolly. Tolly testified that he responded to a report of domestic violence at defendant's home on June 23, 2011, and noticed defendant's burns. The prosecutor asked Tolly if Willie had told him how he received the burns. Defense counsel objected to the impending answer as hearsay. The prosecutor responded that she was offering Tolly's answer only as impeachment evidence, but that the statement would also be admissible

under the excited utterance exception to the hearsay rule. See Ill. R. Evid. 803(2) (eff. Jan. 1, 2011). Defense counsel then objected to the admission of the evidence under the excited utterance exception. The court found that defense counsel's objection was premature, but that the testimony would be admitted for impeachment purposes.

¶ 7 Tolly went on to testify that he spoke with Willie and that Willie was upset. Willie told Tolly that he received the burns because defendant had thrown hot grease on him. Tolly could smell grease on Willie and saw what appeared to be grease dripping down his chest. Inside the home, Tolly smelled grease and saw a pan containing grease residue sitting on the stove. Willie told Tolly that he did not want defendant arrested, and Willie refused to sign a complaint for domestic battery. Tolly arrested defendant anyway because of the burn injuries Willie suffered.

¶ 8 After Tolly's testimony, defendant moved for a directed finding. Defendant argued that Willie's statement should not be considered substantive evidence because it did not qualify as an excited utterance, and as a result, the evidence should be used only for impeachment purposes. The court denied the motion. The court found that the testimony was admissible as substantive evidence under section 115-10.2a of the Code of Criminal Procedure of 1963 (Code). 725 ILCS 5/115-10.2a (West 2010). Section 115-10.2a allows the admission of prior out-of-court statements in domestic battery prosecutions when the witness is unavailable to testify. In accordance with section 115-10.2a(c)(3), the court found that Willie was "unavailable" because he testified to a lack of memory of the statement he made to Tolly. 725 ILCS 5/115-10.2a(c)(3) (West 2010). The court found defendant guilty, and the parties agreed on a sentence of 24 months' domestic violence probation along with a $200 domestic violence fine.

¶ 9 Defendant filed a timely posttrial motion, arguing that Tolly's testimony was inadmissible

hearsay. At a hearing, the State focused on the statement's admissibility as an excited utterance. The court orally denied the motion, finding that the statement was admissible as an excited utterance. The court did not address its prior decision that the statement was admissible under section 115-10.2a. 725 ILCS 5/115-10.2a (West 2010). Defendant appeals.

¶ 10 ANALYSIS

¶ 11 On appeal, defendant argues that the court erred in admitting Tolly's testimony about Willie's statement that defendant threw hot grease on him, because the testimony was inadmissible hearsay. Specifically, defendant argues: (1) the court improperly admitted Tolly's testimony under section 115-10.2a because the declarant (Willie) was not "unavailable" under the statute (725 ILCS 5/115-10.2a(c) (West 2010)); and (2) the statement was not admissible under the excited utterance exception to the hearsay rule (Ill. R. Evid. 803(2) (eff. Jan. 1, 2011)). The State admits the statement was hearsay but argues it was admissible as substantive evidence under both section 115-10.2a and Rule 803(2). The State adds that even if the admission of the evidence was error, the error was harmless.

¶ 12 A. Admissibility under Section 115-10.2a

¶ 13 Section 115-10.2a of the Code allows the admission of hearsay statements if the declarant is unavailable and the statement meets additional requirements[1]. In the present appeal, the only issue is whether Willie was "unavailable" under the statute. 725 ILCS 5/115-10.2a(c) (West 2010).

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[1]The other requirements are: (1) the statement is offered as evidence of a material fact; (2) the statement is more probative than any other evidence reasonably procured; and (3) the general purposes of section 115-10.2a and the interests of justice will be served by admitting the statement. 725 ILCS 5/115-10.2a(a) (West 2010). These requirements are not at issue in this appeal.

¶ 14 There are three circumstances in which a declarant will be considered unavailable: (1) where the declarant is privileged from testifying; (2) where the declarant refuses to testify; and (3) where the declarant "testifies to a lack of memory of the subject matter of the declarant's statement." 725 ILCS 5/115-10.2a(c) (West 2010). In the present case, only the third circumstance is at issue.

¶ 15 The State argues that Willie was unavailable under section 115-10.2a(c)(3) because he testified to a lack of memory of making the statement to Tolly. Defendant argues that Willie was not unavailable, because he remembered and testified about the "subject matter" of his out-of-court statement–*i.e.*, how he received his burns–when he testified that he was burned by hot car radiator fluid. The parties essentially disagree about the meaning of "subject matter" in section 115-10.2a(c)(3). 725 ILCS 5/115-10.2a(c)(3) (West 2010).

¶ 16 To resolve this disagreement, we must interpret the meaning of section 115-10.2a(c)(3). A trial court's decision whether to admit evidence is normally reviewed for an abuse of discretion. *People v. Becker*, 239 Ill. 2d 215 (2010). However, where, as here, the court's decision whether to admit evidence depends entirely on a question of law, we apply *de novo* review. See *In re Marriage of Daebel*, 404 Ill. App. 3d 473 (2010).

¶ 17 We have found no Illinois case addressing the precise issue presented in this appeal. However, the language defining unavailability in section 115-10.2a(c) is identical to the language defining unavailability in Illinois Rule of Evidence 804(a) (eff. Jan. 1, 2011). Because Federal Rule of Evidence 804(a) contains the same language as the Illinois Rule, we rely on case law interpreting the federal rule to guide us in our inquiry.

¶ 18 We find defendant's interpretation of the statute most logical. Unavailability under

section 115-10.2a(c)(3) applies only if the declarant does not remember the subject matter of the statement, *i.e.*, "the events to which his hearsay statements relate." *Lamonica v. Safe Hurricane Shutters, Inc.*, 711 F.3d 1299, 1317 (2013) (quoting *North Mississippi Communications, Inc. v. Jones*, 792 F.2d 1330, 1336 (5th Cir. 1986)). Not remembering the events that the statement describes is distinct from not remembering making the statement itself. The fact that the declarant does not remember making the statement itself is irrelevant for purposes of unavailability.

¶ 19 In the present case, Willie did not testify to a lack of memory of the subject matter of statement, *i.e.*, the events that caused his burns. He testified that he remembered being burned by hot car radiator fluid earlier that day. Willie's testimony that he did not remember making the out-of-court statement to Tolly does not make him unavailable. Because he was not unavailable, his out-of-court statement was not admissible under section 115-10.2a of the Code. 725 ILCS 5/115-10.2a (West 2010).

¶ 20 B. Excited Utterance

¶ 21 Defendant argues that Willie's out-of-court statement was inadmissible under Illinois Rule of Evidence 803(2) (eff. Jan. 1, 2011) as an excited utterance. Because the court's decision to admit the statement was not based purely on an issue of law, we review that decision for an abuse of discretion. *People v. Cookson*, 215 Ill. 2d 194 (2005). This court will find an abuse of discretion only where the trial court's ruling is arbitrary or fanciful, or where no reasonable person could take the view adopted by the trial court. *People v. Caffey*, 205 Ill. 2d 52 (2001).

¶ 22 On January 1, 2011, the Illinois Rules of Evidence became effective. Illinois Rule of Evidence 803(2) applies to the excited utterance exception to the hearsay rule. Ill. R. Evid.

803(2) (eff. Jan. 1, 2011). The Illinois Rules of Evidence, with some exceptions, incorporated the law of evidence in Illinois as manifested in Illinois Supreme Court and Illinois Appellate Court case law. Ill. R. Evid., Committee Commentary (eff. Jan. 1, 2011). Therefore, we rely on existing case law to inform the meaning of the excited utterance exception under Rule 803(2). Ill. R. Evid. 803(2) (eff. Jan. 1, 2011).

¶ 23 An out-of-court statement is admissible as an excited utterance, regardless of the declarant's availability, if the statement was "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Ill. R. Evid. 803(2) (eff. Jan. 1, 2011). For a statement to qualify as an excited utterance: (1) there must be an occurrence sufficiently startling to produce a spontaneous and unreflecting statement; (2) there must be an absence of time in which the declarant might fabricate the statement; and (3) the statement must relate to the circumstances of the occurrence. *People v. Sutton*, 233 Ill. 2d 89 (2009). In determining whether the exception applies, a court must look to the totality of the circumstances. *People v. Williams*, 193 Ill. 2d 306 (2000). The critical inquiry is whether the statement was made while the excitement of the event predominated. *Id.*

¶ 24 Defendant argues that Willie's statement was not made while the excitement of having grease thrown on him predominated. Defendant supports that claim by arguing that: (1) Willie made the statement in response to police questioning, rather than making it spontaneously; (2) Willie had a reason to fabricate the statement to avoid implicating himself in the ongoing domestic battery investigation; and (3) after the event occurred, Willie took a walk, which allowed him time to reflect on the event, prior to making the statement.

¶ 25 We find defendant's arguments unpersuasive. Tolly testified that Willie was upset when

he made the statements. Tolly smelled hot grease on defendant and observed grease dripping down defendant's chest. This testimony supports the trial court's finding that Willie made the statement while the excitement of the event predominated. Although the record does not establish how long Willie had been walking before making his statement, "the critical inquiry with regard to time is whether the statement was made while the declarant was still affected by the excitement of the event." *People v. Connolly*, 406 Ill. App. 3d 1022, 1025 (2011). Willie's upset demeanor and wet grease on his chest indicate that he was still affected by the event.

¶ 26 Although Willie's statement was made in response to police questioning, a statement can be sufficiently spontaneous even if made in response to questioning. See *People v. Lisle*, 376 Ill. App. 3d 67 (2007). There is no evidence in the record to establish that Willie's statement was the result of a series of questions as in *People v. Sommerville*, 193 Ill. App. 3d 161 (1990) which would support a finding that the statement was not spontaneous. Nor do we find that the spontaneity of Willie's statement was colored by his own self-interest in avoiding arrest. Willie's interests also aligned with preventing his wife from going to jail, as evidenced by his protest of her arrest. Therefore, it is unlikely that Willie's statement was manufactured. If Willie had the wherewithal to concoct a false statement, he would have explained the burns in a way that implicated neither himself nor his wife, as he did at trial.

¶ 27 After considering the totality of the circumstances, we conclude that the trial court did not abuse its discretion in admitting the statement as an excited utterance under Rule 803(2). Ill. R. Evid. 803(2) (eff. Jan. 1, 2011).

¶ 28 An out-of-court statement must also pass muster under the confrontation clause of the sixth amendment. U.S. Const., amend. VI; *Crawford v. Washington*, 541 U.S. 36 (2004). Under

the confrontation clause, a testimonial out-of-court statement by a witness who does not testify at trial is inadmissible unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination. *Crawford*, 541 U.S. 36.

¶ 29 The introduction of Willie's statement does not offend the confrontation clause for two reasons. First, Willie testified at trial and was subject to cross-examination. Second, Willie's statement was not testimonial because the primary purpose of Tolly's questioning was to respond to the ongoing emergency of the domestic violence call. See *Michigan v. Bryant*, ___ U.S. ___, 131 S. Ct. 1143 (2011); *Davis v. Washington*, 547 U.S. 813 (2006).

¶ 30 Willie's out-of-court statement was properly admitted as an excited utterance. Ill. R. Evid. 803(2) (eff. Jan. 1, 2011).

¶ 31 CONCLUSION

¶ 32 The judgment of the circuit court of Kankakee County is affirmed.

¶ 33 Affirmed.