

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 683

September Term, 2016

CHRISTOPHER CHARLES CLEMENTE

v.

STATE OF MARYLAND

Graeff,
Kehoe,
Rodowsky, Lawrence F.,
(Senior Judge, Specially Assigned),

JJ.

Opinion by Kehoe, J.

Filed: August 14, 2017

After a jury trial in the Circuit Court for Frederick County, Christopher Charles Clemente, appellant, was convicted of second-degree assault. He was sentenced to incarceration for a term of ten years with all but five years suspended. This timely appeal followed.

The sole issue presented for our consideration is whether the trial court erred in admitting hearsay evidence. Finding no error, we shall affirm.

Background

Taken in the light more favorable to the State, the evidence at trial showed that Mr. Clemente, his then girlfriend, Tina Dorsey, and her cousin, Brittany Holland, were at Ms. Dorsey's apartment in Frederick on October 9, 2015. Holland told Ms. Dorsey that Mr. Clemente was having sex with Holland's fourteen-year-old sister. Mr. Clemente and Ms. Dorsey began to argue, during the course of which Mr. Clemente choked her, slammed her head first into the wall and then into the floor, and scratched her face.

Ms. Dorsey was the first witness to testify. She denied having any recollection of the incident or of calling 911. She testified that she was "very under the influence of alcohol" that evening and that she suffered from a vitamin deficiency that caused memory loss. Ms. Dorsey also stated that she did not think she had been assaulted because she was not bruised or otherwise injured.

In order to prove its case, the State introduced a recording of a telephone call that Ms. Dorsey had made to the 911 center on the night of the assault. The recording was played to the jury. During the call, Ms. Dorsey reported that Mr. Clemente had "slammed [her]

head against the floor.” She advised the 911 operator that no one involved had used alcohol or drugs. During the call, Ms. Dorsey stated that she saw police officers who were responding to the call walking up to her apartment.

The only other State’s witness was Jonathan Schultz, one of the Frederick police officers who responded to the call for a physical domestic dispute at Ms. Dorsey’s home. His version of events was very different from Ms. Dorsey’s.

Detective Schultz testified that, when he arrived at the apartment.,

Ms. Dorsey was crying and she was angry. You could tell that she was physically upset as well and she was upset about the incident that had occurred. . . . She was initially very loud. She was trying to explain what took place. Ultimately I would say, 10, 15 seconds or so, she was able to calm down enough where I was able to understand what she was saying and her volume also lessened at that point. . . . She was crying and trying to talk through, her, her cries.

Over objection, Schultz then gave the following testimony about what Ms. Dorsey told him (emphasis added):

[PROSECUTOR]: And you got some initial information from her?

[DET. SCHULTZ]: Yes.

[PROSECUTOR]: Okay. *And what was it that she told you that the argument and your initial contact with her was about?*

[DEFENSE COUNSEL]: *Objection.*

THE COURT: *Overruled.*

[DET. SCHULTZ]: Initially the argument was, ah, was about the fact that her boyfriend, Mr. Clemente, sent a, ah, a text to a 14-year-old and the text was a picture of his penis.

[PROSECUTOR]: Okay. *And, ah, what did she, what did she indicate to you occurred during the rest of this conversation?*

[DET. SCHULTZ]: She said there was an argument initially and –

[DEFENSE COUNSEL]: *Objection, Your Honor.*

[DET. SCHULTZ]: -- that arg . . .

[DEFENSE COUNSEL]: Just for the record.

THE COURT: *You can have a continuing objection then –*

[DEFENSE COUNSEL]: Thank you, Your Honor –

. . . .

[DET. SCHULTZ]: She said the argument initially was verbal at first. But then it turned physical.

[PROSECUTOR]: All right. And what did she say happened next?

[DET. SCHULTZ]: She said that while she was sitting down Mr. Clemente stood up and put both of his hands around her neck. At what – at one point causing her to not be able to breathe. At that point she said Mr. Clemente also struck her head.

[PROSECUTOR]: Well, when – um, when she was describing, Let's back up a minute. When she was describing his actions of putting his hands, both hands around, around her neck, did she explain that she had any preexisting injury?

[DET. SCHULTZ]: Yes. Yes she did.

. . . .

[PROSECUTOR]: [Could] you tell the ladies and gentlemen of the jury about that?

[DET. SCHULTZ]: She stated to me that she had a preexisting thyroid condition and that the act of Mr. Clemente wrapping his, or putting his hands around her neck made that condition worse.

[PROSECUTOR]: What did she say happened next?

[DET. SCHULTZ]: After that she said Mr. Clemente bashed her head into a shelf that was directly behind where Ms. Dorsey was seated.

. . . .

[PROSECUTOR]: So what happened after the shelf incident?

[DET. SCHULTZ]: After that Ms. Dorsey told me that Mr. Clemente let go of, of her and then Ms. Dorsey said that she stood up and walked towards the front door of the apartment. At that time she said Mr. Clemente walked over to the foyer where Ms. Dorsey was and attempted to grab her throat again with both hands. For some reason one of the hands did not, or was not able to make contact with the neck and caused a scratch on Ms. Dorsey's left cheek.

[PROSECUTOR]: Were you able to observe that?

[DET. SCHULTZ]: Yes.

[PROSECUTOR]: And did she indicate that's how she received that scratch?

[DET. SCHULTZ]: Yes.

[PROSECUTOR]: All right.

A. After that scratch was made Ms. Dorsey stated that Mr. Clemente had one hand around her neck and then his other hand was on her chest, and bashed her head into the wall of the foyer and then threw her to the ground and bashed her head into the floor of the foyer. It was at that point she said Mr. Dorsey (sic) – or I'm sorry, Mr. Clemente, ah, then left the apartment.

An ambulance was called to the scene, but Ms. Dorsey refused to be transported to the hospital. Detective Schultz did not smell any alcohol on Ms. Dorsey's breath and testified that her speech was not slurred and her eyes were not bloodshot. He prepared a written victim statement which described the assault and stated that none of the participants had been under the influence of drugs or alcohol. Photographs were taken of the scratch on her cheek. These items were admitted into evidence. Mr. Clemente's trial

counsel objected to the introduction of the written statement on the grounds that it was hearsay but the objection was overruled.

Holland testified on behalf of Mr. Clemente. She acknowledged that she told Ms. Dorsey that Mr. Clemente was having sex with her fourteen-year-old sister even though she knew that was not true. Holland said she lied because she didn't like Mr. Clemente and did not like it when he refused to let her see Ms. Dorsey. According to Holland, Mr. Clemente and Ms. Dorsey engaged in a verbal argument, but there was no physical contact between them. Holland said that she lied to the police when she told an officer that Mr. Clemente had taken her telephone. Holland claimed that her memory was "short" because she had been hit by a car.

On rebuttal, Detective Schultz testified that he had also interviewed Brittany Holland, who provided a brief overview of what happened. She said that Mr. Clemente grabbed Ms. Dorsey and struck her head on a shelf, on the foyer wall, and on the foyer floor. Holland claimed that Mr. Clemente had stolen her cell phone.

Analysis

I.

Mr. Clemente contends that the trial court erred in admitting Detective Schultz's testimony about what Ms. Dorsey told him had occurred. According to Mr. Clemente, none of Detective Schultz's testimony about Ms. Dorsey's statement should have been admitted because it constituted hearsay that did not fall within a recognized exception. He maintains that Ms. Dorsey's statements to the detective did not qualify as a prior

statement by a witness under Md. Rule 5-802.1(a) because it was not given under oath, reduced to writing, or recorded. The State does not contest this point.

Mr. Clemente also contends that Ms. Dorsey’s statements did not qualify as an excited utterance because there was neither a finding of “a dramatic incident sufficient to generate the requisite excitement” nor evidence that Ms. Dorsey was “so in the throes of the exciting event as to be incapable of reflective narration.” Mr. Clemente asserts that Ms. Dorsey’s statements were not the “near-involuntary spontaneous outburst contemplated by the excited utterance exception,” but rather constituted a “complex, reflective, narrative account of the alleged incident[.]”

In response, the State argues that the admission of the police officer’s testimony as to Ms. Dorsey’s statement was admissible because it was an excited utterance. As a fallback position, the State asserts that admission of the evidence was harmless error because substantially the same evidence was properly admitted.

We need not address the harmless error issue because Ms. Dorsey’s statement to Detective Schultz was admissible as an excited utterance.

II.

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Md. Rule 5-801(c). As a general rule, hearsay evidence must be excluded at trial unless it falls within one of many exceptions or is permitted by applicable constitutional provisions or statutes. *Thomas v. State*, 429 Md. 85, 98 (2012); *Bernadyn v. State*, 390 Md. 1, 7-8

(2005). Maryland Rule 5-803(b)(2) provides that an out-of-court statement is not excluded as hearsay if it “relat[es] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”

Whether any particular evidence is hearsay is a legal issue and is reviewed de novo by an appellate court. *See, e.g., Gordon v. State*, 431 Md. 527, 538 (2013).

III.

As the Court of Appeals has recognized:

“In determining whether a statement falls within the excited utterance exception, we examine the totality of the circumstances. A statement may be admitted under this exception if the declaration was made at such a time and under such circumstances that the exciting influence of the occurrence clearly produced a spontaneous and instinctive reaction on the part of the declarant who is still emotionally engulfed by the situation.”

Cooper v. State, 434 Md. 209, 242 (2013) (quoting *State v. Harrell*, 348 Md. 69, 77 (1997) (citations and quotation omitted)).

The Court of Appeals has explained that:

The proponent of a statement purporting to fall within the excited utterance exception must establish the foundation for admissibility, namely personal knowledge and spontaneity.

Parker v. State, 365 Md. 299 (2001).

Obviously, Ms. Dorsey had personal knowledge of the assault and we do not understand Mr. Clemente to contend otherwise. The spontaneity requirement is satisfied if the declarant was “still emotionally engulfed” in the incident that prompted the out-of-court utterance. *Deloso v. State*, 37 Md. App. 101, 106 (1977). It is not precisely clear how long it took Detective Schultz to reach Ms. Dorsey’s apartment after the assault took

place but passage of time is not the conclusive factor. The utterance may be subsequent to the incident, so long as the exciting influence has not been lost, so that what is said “is, in fact, a spontaneous reaction to the occurrence, rather than an independent, preconceived expression of the speaker’s will.” *Id.* That the utterance was made in response to a question from the police is not also dispositive. *See Parker v. State*, 365 Md. 299, 316-18 (2001) (statements made in response to police questioning at the crime scene can be admissible as excited utterances); *Long v. State*, 3 Md. App. 638, 640-41 (1968) (shooting victim’s statement was admissible even though given in response to police questioning two hours after the shooting).

The Court’s analysis in *Parker* is instructive. At the trial in that case, a witness testified that:

that he was the first police officer on the scene, arriving at 2111 Barclay Street within minutes after the shooting. . . . [He] encountered two women in the residence, both of whom, he testified, were “visibly upset.” He described the older woman as “almost like hysterical,” and he testified that she was “crying, running back and forth” in a “panic.” The other woman was “crying [and] emotional.” The women made statements about the gunman[.] The officer testified that he remembered the substance of the women’s statements, but that he could not identify the women by name and that he could not recall precisely which words were spoken by which woman.

365 Md. at 311–12.

After reviewing relevant authority, the Court concluded that:

the startling event of the shooting dominated the thought processes of the declarants when the statements were made and that the statements were not the product of “thoughtful reflection or . . . deliberate investigation. . . . The State met its burden of demonstrating spontaneity.”

Id. at 317–18.

We believe that the same reasoning applies in the present case. When Detective Schultz arrived at the scene, Ms. Dorsey was crying and angry and was “physically upset as well and she was upset about the incident that had occurred. . . . She was initially very loud. She was trying to explain what took place.” About 15 seconds later, she “was able to calm down enough where [Detective Schutz] was able to understand what she was saying and her volume also lessened at that point. . . . She was crying and trying to talk through, her, her cries.” In other words, Ms. Dorsey was still laboring under the “the exciting influence” of the assault; her emotional state was very similar to that of the two declarants in *Parker*. The trial court properly admitted the officer’s testimony about what Ms. Dorsey told him on the night of the assault.

**THE JUDGMENT OF THE CIRCUIT COURT FOR FREDERICK COUNTY
IS AFFIRMED. APPELLANT TO PAY COSTS.**