

1999

West Valley City v. Wade Hutto : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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| WEST VALLEY CITY, | : | |
| | : | |
| Plaintiff/Appellee, | : | |
| | : | Case No. 990211-CA |
| v. | : | |
| | : | Priority No. 2 |
| WADE HUTTO, | : | |
| | : | |
| Defendant/Appellant. | : | |

BRIEF OF THE APPELLEE

Appeal from the Third Judicial District Court,
West Valley Department,
in and for Salt Lake County, State of Utah;
the Honorable Anthony B. Quinn

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FILED
Utah Court of Appeals
OCT 29 1999
Julia D'Alesandro
Clerk of the Court

IN THE UTAH COURT OF APPEALS

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| WEST VALLEY CITY, | : | |
| | : | |
| Plaintiff/Appellee, | : | |
| | : | Case No.990211-CA |
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STATEMENT OF JURISDICTION

Appellate jurisdiction over this case is rested in the Utah Court of Appeals pursuant to §78-2a-3(2)(e), Utah Code Annotated.

STATEMENT OF THE ISSUES

**ISSUE I. DID THE TRIAL JUDGE PROPERLY
ADMIT HEARSAY STATEMENTS AS
"EXCITED UTTERANCES" IN
ACCORDANCE WITH RULE 803(2)
UTAH RULES OF EVIDENCE?**

The appropriate standard of review of a trial court's decision to admit hearsay evidence under Rule 803 depends on the particular ruling in dispute. *Hansen v. Heath*, 852 P.2d 977 (Utah 1993). In this case, the issue of whether a statement is an "excited utterance" is a factual determination by the trial court and should be reviewed using an abuse of discretion standard. *State v. Thomas*, 777 P.2d 445 (Utah 1989). Whether or not the second prong of the Rule 803(2) test has been satisfied is reviewed under an abuse of discretion standard. *State v. Mickelson*, 848 P.2d 677, 686 (Utah App. 1992).

**ISSUE II. DOES HUTTO'S BRIEF FAIL TO
MARSHAL THE EVIDENCE WHICH
SUPPORTS THE TRIAL COURT'S
DECISION TO ADMIT EXCITED
UTTERANCE EVIDENCE?**

The trial court's decision to admit the excited utterance testimony of the victim Tyson is based upon certain factual determinations of the trial court. When attacking the findings of fact of a trial court the appellant must marshal all of the evidence in support of the trial court's findings of fact, and then demonstrate that the evidence, including all reasonable inference drawn therefrom, is insufficient to support the findings against an attack. *State v. Moosman*, 794 P.2d 474 (Utah 1990).

**DETERMINATIVE CONSTITUTIONAL PROVISIONS,
STATUTES, ORDINANCE, AND RULES**

Rule 803(2), Utah Rules of Evidence.

Rule 803. Hearsay exceptions; availability of declarant immaterial.

The following are not excluded by the hearsay rule, even though the declarant is available as a witness.

- (2) *Excited utterance.* A statement relating to a startling event or condition made while the

declarant was under the stress of excitement caused by the event or condition.

STATEMENT OF THE CASE

NATURE OF THE CASE

This case involves a prosecution and conviction for a violation of Section 76-5-102, Assault (Domestic Violence) and Section 76-6-106, Criminal Mischief (Domestic Violence).

COURSE OF PROCEEDINGS

On or about October 25, 1998, Wade Hutto ("Hutto") was cited and booked into jail for Assault (Domestic Violence) and Criminal Mischief (Domestic Violence). An information charging those two misdemeanor crimes was filed with the court on December 2, 1998. On December 16, 1998, a bench trial was held before the Honorable Anthony B. Quinn of the Third District Court.

DISPOSITION IN TRIAL COURT

At trial, Hutto was convicted of Assault (Domestic Violence) and Criminal Mischief (Domestic Violence). Hutto was sentenced to serve 180 days of consecutive jail time for each conviction, was fined \$150, and was put on probation to

the court for a period of 12 months. One hundred eighty days of the jail sentence was suspended. (Record P.21).

Notice of appeal in this case was filed on March 8, 1999.

STATEMENT OF THE FACTS

The following facts are relevant to the issues on appeal:

1. At approximately 9 a.m. on October 25, 1998, Officer Jensen of the West Valley City Police Department responded to a Domestic Assault report at 3079 South 3080 West in West Valley City. (Transcript, p.5)

2. Upon arrival at the above referenced location, Officer Jensen found the victim, Therese Tyson ("Tyson"). Tyson stated that she had called the police. (Transcript p.6).

3. Officer Jensen observed that Tyson was dressed in a t-shirt and a pair of jeans and was not wearing any shoes or socks. (Transcript p.7).

4. Officer Jensen observed several injuries to Tyson. She testified that Tyson had a small cut on her forehead that had been bleeding, she had red marks on her neck, a one or two inch in diameter red mark on her stomach, and a four

or five inch in diameter deep red mark on her back.

(Transcript pp.11-12).

5. Officer Jensen testified that her impression of Tyson's emotional state was "extremely upset", "very agitated", and "quite nervous, her body language".

(Transcript p.7). Officer Jensen also described how Tyson's emotional state kept fluctuating throughout the interview.

(Transcript p.8). Officer Jensen stated that even during what she considered the "calm" periods of the interview, Tyson was shaking and crying. (Transcript p.8). Jensen testified that during these "calm" periods you could "at least get her attention and talk to her". During her more agitated periods, Jensen described Tyson as unable to focus.(Transcript p.8). Jensen testified that Tyson kept stopping while writing her witness statement and had to be continually reminded to continue. (Transcript p. 20).

6. The court allowed Officer Jensen to recite certain statements made by Tyson for the limited purpose of determining whether Tyson's statements were excited utterances, and therefore, admissible pursuant to Rule 803(2), Utah Rules of Evidence. (Transcript pp. 9-10).

7. Officer Jensen testified that she had been told by

Tyson that Tyson's live in boy friend, Wade Hutto, had assaulted her at approximately 3:30 a.m. that morning. (Transcript p.10).

8. Based on the foregoing facts, the trial court determined that the statements made by Tyson to Officer Jensen were excited utterances and allowed Officer Jensen to continue to testify about Tyson's statements pursuant to Rule 803(2), Utah Rules of Evidence. (Transcript p. 21).

9. Following the court's ruling, Officer Jensen testified that Tyson had stated the following:

a. Hutto had been mad at her for refusing to go get drugs. (Transcript p. 21).

b. During the argument Hutto started hitting and pushing her. More specifically, Hutto punched her in the side of her head, knocking her head into another object which caused the cut on her forehead. Hutto also hit her in the back with something, but Tyson didn't know what the object was. Tyson also stated that Hutto had been standing on her neck. (Transcript p. 22).

c. Tyson also told Officer Jensen that she had left her house in the middle of the night and had run to her mother's house. (Transcript pp. 21-23).

10. Officer Jensen testified that the distance between the address at which she interviewed Tyson, which was Tyson's mother's house, and Tyson's house, was six blocks. (Transcript p. 23).

SUMMARY OF THE ARGUMENTS

I. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING CERTAIN STATEMENTS AS "EXCITED UTTERANCES" IN ACCORDANCE WITH RULE 803(2) UTAH RULES OF EVIDENCE.

Approximately five and one half to six hours after being assaulted, suffering numerous injuries, and fleeing her residence, Therese Tyson made several statements to a police officer. The officer described Tyson as extremely upset, very agitated, crying and shaking. The trial court correctly determined that these statements met the three prong test for admissibility under Rule 803(2), Utah Rules of Evidence. The court found that there occurred a startling event (the assault, the injuries and the flight), Tyson was still under the stress and excitement of the startling event when making the statements, and her statements were directly

related to the startling event. The trial court's decision to admit these statements was based upon the above stated findings of fact and was not an abuse of discretion.

II. HUTTO'S BRIEF FAILS TO MARSHAL THE EVIDENCE WHICH SUPPORTS THE TRIAL COURT'S DECISION TO ADMIT EXCITED UTTERANCE EVIDENCE.

The trial court's decision to admit excited utterance evidence is based upon certain predicate evidence necessary to meet the three prong test under Rule 803(2). Hutto's brief attacks the courts decision to admit the evidence, but fails to marshal the facts upon which that decision was based. When challenging the factual findings of the trial court on appeal, the appellant must show that the factual findings were clearly erroneous. In order to show error, the appellant must marshal all of the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack. *State v. Moosman*, 794 P.2d 474 (Utah 1990). Hutto has failed to adequately marshal the evidence which supports the trial court's factual findings. That failure constitutes a separate and valid reason for affirming the decision of the trial court.

DETAIL OF THE ARGUMENT

I. THE TRIAL JUDGE DID NOT ABUSE HIS DISCRETION IN ADMITTING CERTAIN STATEMENTS AS "EXCITED UTTERANCES" IN ACCORDANCE WITH RULE 803(2) UTAH RULES OF EVIDENCE.

The trial court correctly concluded that Therese Tyson's statements, which were made while she was extremely upset, very agitated, crying, shaking, and exhibiting numerous injuries, were excited utterances and, therefore, inherently reliable. The trial court's decision to admit these statements was based upon the evidence that had been provided to the trial court and was not an abuse of discretion.

As a general rule, hearsay statements are not allowed into evidence in court proceedings. However, certain hearsay statements are considered to be inherently reliable and, therefore, exceptions to the hearsay prohibition have been created. One such exception is the "excited utterance." This exception has been codified as Rule 803(2), Utah Rules of Evidence. The excited utterance exception has a long history and is considered to be a "firmly rooted"

exception to the hearsay rule. *White v. Illinois*, 502 U.S. 346, n.8(1992).

Excited utterances are a firmly rooted exception to the hearsay rule because of their high degree of reliability. The United States Supreme Court has stated that: "Admission under a firmly rooted hearsay exception satisfies the constitutional requirement of reliability because of the weight accorded longstanding judicial and legislative experience in assessing the trustworthiness of certain types of out-of-court statements." *Idaho v. Wright* 495 U.S. 805(1990). Also, the Tenth Circuit Court of Appeals, in an excited utterance case, has stated "reliability may be inferred without any further showing if the statement falls within a firmly rooted hearsay exception." *Cole v. Tansy*, 926 F.2d 955(10th Cir. 1991). The Utah courts have also firmly established that excited utterances are admissible because the circumstances under which such statements are given provides sufficient assurance of trustworthiness. *State v. Mickelson*, 848 P.2d 677(Utah App.1992).

The Utah Supreme Court has established a three prong test for determining whether a statement is admissible as an excited utterance under Rule 803(2). This test establishes

that a statement is an excited utterance only when (1) a startling event or condition occurred; (2) the statement was made while the declarant was under the stress of excitement caused by the event or condition, and (3) the statement relates to the startling event or condition. *State v. Cude*, 784 P.2d 1197 (Utah 1989). In this case, there is not any dispute that a startling event occurred and, therefore, the first prong of the test has been met. There was evidence before the court that the victim Tyson had numerous fresh injuries. Also, the way she was dressed, in light clothing and no shoes or socks, support her statement that she fled her house.

The issue in this case is the second prong of the test, whether or not Tyson's statements were produced under the stress and excitement of the startling event. The Utah Supreme Court has recognized that this is often a difficult issue. In *State v. Smith*, 909 P.2d 236 (Utah 1995), the court stated:

Usually the most difficult issue in determining the admissibility of an excited utterance is whether the statement was uttered with the spontaneity produced by emotional excitement to a degree that provides a warrant of trustworthiness. The determination requires an evaluation of a

variety of factors, including the nature of the startling event and the intensity of the excitement or other emotional effect on the declarant.

State v. Smith, at page 240.

Hutto argues that the time period between the startling event and Tyson's statements to Officer Jensen, a period of five and one half to six hours, is too long a period to fall within the excited utterance rule. This argument is simply not accurate. The time lapse between the startling event and the statement is not one of the prongs of the Rule 803(2) test. Courts have held that temporal proximity of the events is only one of the factors to be considered and is not dispositive of the application of the exception to the hearsay rule. *State v. Smith*, 909 P.2d 236 (Utah 1995); see also *Gross v. Greer*, 773 F.2d 116 (7th Cir. 1985) ("It is well established that the lapse of time between the startling event and the out-of-court statement, although relevant, is not dispositive in the application of the res gestae exception to the hearsay rule."); *Washington v. Fleming*, 621 P.2d 779 (Wash. App. 1980); *United States v. Thomas*, 149 F.3d 1192 (10th Cir. 1998) ("...there is no bright-line rule restricting the amount of time that can pass between a startling event and an excited utterance; the

key factor is whether the declarant is still under the stress of the startling event."). (Pursuant to 10th Cir. Rule 36.3, and Rule 24(a)(11)(B), Utah R. App. P., this case is attached as an addendum to this brief.)

We can also look to the federal courts interpretation of the analogous federal rule for guidance. *State v. Cude*, footnote 7, at page 1200. For example, in *United States v. Akins*, 153 F.3d 728 (10th Cir. 1998), an Order and Judgment which is not binding precedent, the court stated:

We have previously stated that "lapse of time does not necessarily negative the existence of an excited state." *Garcia v. Watkins*, 604 F.2d 1297, 1300 (10th Cir. 1979). Thus, we have held that so long as the evidence demonstrated that a declarant made an out-of-court statement while still under the stress of a startling event, that statement was admissible as an excited utterance notwithstanding the fact that the declarant made the statement nine hours, see *United States v. Rosetta*, 1997 WL 651027, at **2 (10th Cir. Oct 10, 1997), or even a full day, see *United States v. Farley*, 992 F.2d 1122, 1126 (10th Cir. 1993), after the startling event.

United States v. Akins. (Pursuant to 10th Cir. Rule 36.3, and Rule 24(a)(11)(B), Utah R. App. P., this case is attached as an addendum to the brief.)

The Utah Supreme Court has gone so far as to say that while the passage of time is one measure of whether a statement is the product of a startling occurrence, it is not the most reliable one. *Mickelson*, at page 685. The real question that the court must answer when determining admissibility of excited utterance hearsay is whether the statement was made while the declarant was still under the influence of the event to the extent that the statement cannot be the result of fabrication, intervening actions, or the exercise of choice or judgment. The Utah Supreme Court has termed this the "crucial question." *State v. Thomas*, at page 449. In this case, there was sufficient evidence presented to the trial court to indicate that Tyson's statements were made under great stress and excitement. Such evidence is adequate to satisfy the second prong of the Rule 803(2) test. In *State v. Mickelson*, the Court of Appeals stated:

Evidence that there was a reasonable basis for the declarant's continuing emotional distress, or that the declarant was actually nervous or distraught at the time the statement was made, has generally been accepted as adequate to rebut the presumption against an excited utterance. See, e.g., *Webb v. Lane*, 922 F.2d 390, 394-95 (7th Cir. 1991) (statements made several hours after

shooting were excited utterances, since declarant was still in extreme pain and shock after being shot); *United States v. Scarpa*, 913 F.2d 993, 1017 (2d Cir. 1990) (lapse of five or six hours between beating and statement not dispositive when victim was still very nervous); *State v. Anaya*, 799 P.2d 876, 881 (Ariz. App 1990); *People v. Sandoval*, 709 P.2d 90, 92 (Colo. App. 1985).

State v. Mickelson, at page 685.

This determination as to the degree of emotional arousal and spontaneity of the declarant is subject to no precise or absolute standard. *State v. Smith*, at page 240. In this case, there is ample evidence to support the trial court's determination that such emotional arousal and spontaneity surrounded Tyson's statements to Officer Jensen. Officer Jensen testified that her impression of Tyson's emotional state was "extremely upset". She also described Tyson as "very agitated" and "quite nervous, her body language". (Transcript p.7). During her testimony, Officer Jensen also described how Tyson's emotional state kept fluctuating throughout the interview. Officer Jensen testified that even during what she considered to be Tyson's "calm" periods, Tyson was shaking and crying. (Transcript p.8) During her more emotional periods, Tyson was described as being unable to focus and her mind would race off to the

retelling of other situations and events. (Transcript p. 8). Also, Officer Jensen observed numerous injuries to Tyson's body. Clearly these injuries would contribute to her state of excitement.

Officer Jensen's description of Tyson as "extremely upset", "very agitated", and "shaking, still crying" is very similar to the evidence produced in the *Mickelson* case. In that case, the court found that a four or five hour time delay supported a presumption that the victim was no longer under the stress of the startling event. However, the court also found that the facts produced regarding the actual emotional state of the victim at the time of the statement were adequate to rebut that presumption. In describing the evidence, the court stated "...she was visibly upset and nervous, and had been crying--evidence that, despite sufficient time for reflective thought, W.M.'s statements were nonetheless the result of the stress of the startling event." *Mickelson*, at page 686.

Hutto directs the court's attention to Exhibit I, the statement written by Tyson during her interview with Officer Jensen. However, the preparation of this statement is a factor which supports the conclusion that Tyson was in an

excited state. Officer Jensen testified that it took Tyson approximately one half hour to 45 minutes to write the witness statement because she kept stopping and had to be reminded to continue by Officer Jensen. If she couldn't focus her thoughts clearly enough to complete the statement, how could she focus her thoughts enough to fabricate her story?

Hutto also argues that Tyson spent the interval between the startling event and the statements with her mother and speculates that this may have effected Tyson's statement. (Appellant's Brief pp.14, 16). This entire argument is pure speculation and is simply not based upon the record. There is no indication whatsoever in the record as to the amount of time Tyson spent with her mother. The only reference to the presence of Tyson's mother that is contained in the record indicates that Tyson's mother was present at the time the police were conducting their interview. (Transcript pp.7, 12). Even if Hutto is correct in his speculation, and Tyson's mother was present during the interval, this is simply a non-issue. Tyson's emotional and mental state at the time the statements were made was more that adequately proven by the testimony of Officer

Jensen. The trial court correctly determined that Tyson's statements to officer Jensen were made while Tyson was still under the stress and excitement of the startling event. The second prong of the Rule 803(2) test was satisfied.

The third prong of the Rule 803(2) test is not in dispute. Clearly, the statements made by Tyson regarding Hutto's assault and her nighttime flight to her mother's house are directly related to the startling event - Hutto's assault.

Given the facts before him, an obviously very upset, agitated, injured woman, who has fled her home in the middle of the night, the trial judge correctly determined that the statements made by Tyson to Officer Jensen were produced under the stress and excitement of the assault. This is true even though the statements were made five and one half to six hours after the assault. Tyson was incapable of focusing her thoughts well enough to entertain the type of reflective thinking necessary to fabricate her story. The facts related to the officer by Tyson are inherently reliable and are admissible under Rule 803(2) Utah Rules of Evidence.

**II. HUTTO'S BRIEF FAILS TO MARSHAL THE
EVIDENCE AGAINST HIM SUPPORTING THE
VERDICTS OF THE TRIAL COURT.**

The trial court's decision to admit excited utterance evidence is based upon certain predicate evidence necessary to meet the test under Rule 803(2). Hutto's brief attacks the courts decision to admit the evidence, but fails to marshal the facts upon which that decision was based. The law of the State of Utah on this subject is well settled. When challenging the findings of fact of the trial court on appeal, the appellant must show that the findings of fact were clearly erroneous. In order to show error, the appellant must marshal all of the evidence in support of the trial court's findings of fact and then demonstrate that the evidence, including all reasonable inferences drawn therefrom, is insufficient to support the findings against an attack. *State v. Moosman*, 794 P.2d 474 (Utah 1990).

Hutto's brief fails to present almost all of the evidence which supported the trial court's determination that Tyson's statements were excited utterances. He fails to inform the court that Officer Jensen testified that Tyson was "very agitated", "extremely upset", "quite nervous", and that she was crying and shaking. (Transcript pp. 7-8). He

also fails to describe her injuries in any detail. Instead, Hutto simply recites those few facts which he believes are favorable to his appeal. This one sided version of the factual findings underlying the trial court's decision does not meet the marshaling requirements. *State v. Decorso*, 370 Utah Adv. Rep 11 (Utah 1999). Peck's failure to adequately marshal the evidence which supports the trial court's ruling is a separate and valid reason for affirming the decision of the trial court.

CONCLUSION

The trial court did not abuse its discretion when it determined that statements made by a extremely upset, very agitated, crying, shaking, and injured woman were excited utterances and, therefore, admissible exceptions to the hearsay prohibition under Rule 803(2), Utah Rules of Evidence. The convictions should be affirmed.

DATED this 29th day of OCTOBER, 1999.

WEST VALLEY CITY



J. Richard Catten, Senior Attorney
Attorney for Plaintiff/Appellee

CERTIFICATE OF SERVICE

I, J. Richard Catten, certify that on the 29th
day of October, 1999, I served upon Steven D. Miller,
Attorney for Defendant/Appellant, two (2) copies each of the
Brief of the Appellee, by causing said Briefs to be mailed
to them, by first class mail, with sufficient postage
prepaid, to the following addresses:

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West Valley City, Utah 84119

WEST VALLEY CITY



J. Richard Catten, Senior Attorney
Attorney for Plaintiff/Appellee

ADDENDUM

UNPUBLISHED CASES:

United States v. Thomas

United States v. Akins

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

JUN 9 1998

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| UNITED STATES OF AMERICA, Plaintiff - Appellee, v. DEYON THOMAS, Defendant - Appellant. | PATRICK FISHER No. 96-1458 Clerk (D. Ct. No. 96-CR-48-AJ) (D. Colo.) |
|---|--|

ORDER AND JUDGMENT^(*)

Before **TACHA, LUCERO**, and **MURPHY**, Circuit Judges.

Defendant Deyon Thomas was tried before a jury and convicted of possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1); possession of a firearm by a convicted felon in violation of 18 U.S.C. § 922(g)(1); and using or carrying a firearm during and in relation to a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1). He was sentenced to approximately 26 years in prison. Defendant now appeals his convictions and sentencing. We exercise jurisdiction under 18 U.S.C. §§ 1291 and 3742(a), and affirm.

Background

On January 10, 1996, a Denver drug task force used Christopher Epperson, a government informant with drug charges pending against him, to make a controlled buy of cocaine base (or crack cocaine) at a suspected crack house at 3102 Columbine. When Epperson knocked and rang the doorbell, defendant Deyon Thomas opened the door, holding a gun in his left hand. Epperson testified that the weapon appeared to be a black steel .45 caliber gun.⁽¹⁾ As Epperson entered the house, Thomas moved the gun behind his back, but Epperson did not see exactly what he did with it. The drug transaction took about ten minutes, during which time Epperson paid Thomas \$240 in exchange for drugs, later confirmed to be crack cocaine. Epperson testified that Will Harper, Thomas's half-brother, also was in the room while the transaction was conducted.

Shortly after the controlled buy, officers obtained and executed a search warrant for the house. The police used a crowbar to open the screen door and a ninety-pound ram to break down the front door. The first officer to enter the residence saw Thomas move quickly out of sight. After pursuing Thomas, the officer found Thomas on his back on the floor with his hands in the air begging the officer not to shoot him. Another officer found a nine millimeter handgun on the floor near where the defendant was lying down. During the search of the house, the officers also found various caches of crack cocaine hidden about the house, as well as a scale of the sort typically used by drug dealers to measure out quantities of drugs. A search of Thomas's person revealed \$1,735 in cash hidden in his socks.

Thomas and Harper were both arrested. While they were in the police car, Harper made statements to Thomas that the dope found in the house belonged to Thomas and that Harper himself was not involved.

During initial questioning by officers at the scene, Thomas stated that he was house sitting for a friend and that the gun the officers found had always been there, as long as he had been there. He stated that he had been burglarized recently, that he grabbed the gun when he heard people forcibly entering the house because he thought they might be burglars, and that he then dropped it upon hearing the officers yelled "police." Upon further questioning at the police station, however, he stated that a man named Kevin had supplied him with a ticket to Denver, given him fifteen ounces of crack cocaine to sell, given him a gun and a customer list, and allowed him to use the residence at 3201 Columbine for dealing the drugs. Prior to both periods of questioning, Thomas signed forms acknowledging that he had been informed of his rights.

Thomas contests his convictions and sentencing on a variety of grounds. First, he argues that there was insufficient evidence that he used or carried a firearm during and in relation to a drug offense as required by 18 U.S.C. § 924(c)(1). Second, he contends that the trial court should not have allowed Harper's hearsay statement to be introduced into evidence as an excited utterance. Third, he argues that the government failed to prove the substance involved was crack cocaine, and thus he should have been sentenced for powder cocaine rather than for crack. Fourth, he claims that the sentencing guidelines regarding crack cocaine are unconstitutional. Finally, he asserts that the trial judge should have recused himself before sentencing. For the reasons set forth below, we affirm.

Discussion

1. Sufficiency of the Evidence for the Section 924(c) Conviction

The defendant first argues that the evidence was insufficient to support a finding that he used or carried a firearm during and in relation to a drug trafficking crime as required by 18 U.S.C. § 924(c). We review the record de novo to determine whether there is sufficient evidence to support the jury's verdict. See, e.g., United States v. Wilson, 107 F.3d 774, 778 (10th Cir. 1997). Evidence is sufficient to support a conviction if a reasonable jury, considering the evidence and the inferences to be drawn therefrom in the light most favorable to the government, could find the defendant guilty beyond a reasonable doubt. See id. In evaluating the evidence under this standard, the court will not question a jury's credibility determinations or its conclusions about the weight of the evidence. See United States v. Johnson, 57 F.3d 968, 971 (10th Cir. 1995).

Section 924(c) imposes a mandatory five-year sentence on a defendant who "uses or carries" a firearm "during and in relation to" a drug trafficking crime. 18 U.S.C. § 924(c)(1).⁽²⁾ In the context of section 924(c), "use" means "active employment" of the firearm by the defendant, which includes brandishing or displaying the firearm. Bailey v. United States, 516 U.S. 137, 143, 148 (1995). The term "carry" involves two elements: "possession of the weapon through the exercise of dominion or control; and transportation of the weapon." United States v. Spring, 80 F.3d 1450, 1465 (10th Cir.), cert. denied, 117 S. Ct. 385 (1996) (quoting United States v. Martinez, 912 F.2d 419, 420 (10th Cir. 1990)). The evidence here was sufficient to support a finding that the defendant both used and carried a weapon during and in relation to the drug trafficking crime.

It was undisputed at trial that Thomas was displaying a gun when he came to the door. There was evidence before the jury that the primary purpose of the house, and Thomas's presence there, was to run a crack cocaine sales operation. A government witness testified that drug dealers often carried firearms to protect themselves, the drugs, and the drug proceeds against rival distributors and against individuals who might come to the "crack house" seeking to steal rather than purchase the drugs. A reasonable inference from all this evidence was that the defendant displayed the weapon because he expected the call to be for a drug transaction, and that he wanted to deter the caller from attempting to harm him or steal the drugs or the proceeds. Although Thomas claimed that he carried the weapon because he feared burglars, the jury was free to reject that assertion; we will not review the jury's credibility determinations. See Johnson, 57 F.3d at 971. The evidence is sufficient to allow a reasonable jury to find that, by displaying the weapon at the door, the defendant used the weapon during and in relation to a drug transaction.

The evidence also is sufficient for a reasonable jury to find that Thomas carried the weapon during and

in relation to the drug transaction. Although Epperson could not see exactly what Thomas did with the weapon when he put it behind his back, a reasonable inference is that he placed it in the back of his waistband and was carrying it throughout the drug transaction. There was a sufficient evidentiary basis, therefore, for a reasonable jury to find that the defendant violated section 924(c).

In making his sufficiency-of-the-evidence argument, the defendant notes the discrepancy in the evidence relating to the gun. Epperson testified that Thomas arrived at the door with a black steel .45, while the actual gun found near the defendant during the police search of the premises was a chrome (silver) nine millimeter. There are several ways in which a reasonable juror might resolve this evidentiary discrepancy in favor of the government. For instance, a juror might believe that Thomas brought the nine millimeter to the door to meet Epperson, and that Epperson mistakenly recollected the gun as a black .45. Because a reasonable juror could resolve the conflict in favor of the government, the discrepancy does not make the evidence insufficient to support the defendant's conviction for violating section 924(c).

2. Admission of Harper's "Excited Utterance"

The defendant argues that the statements made by his half-brother, Harper, who did not testify at trial, should not have been allowed into evidence because they were inadmissible hearsay. See Fed. R. Evid. 802. The district court allowed the government to introduce the statements under Federal Rule of Evidence 803(2), which permits the introduction of "excited utterances" as an exception to the hearsay rule. An "excited utterance" is defined as "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Fed. R. Evid. 803(2). The district court found that Harper's statements fell within the excited utterance exception to the hearsay rule because they were made while he was still under the stress of the police breaking into the house and arresting him.

We review the district court's evidentiary rulings for abuse of discretion. See United States v. Trujillo, 136 F.3d 1388, 1395 (10th Cir.), petition for cert. filed, (U.S. May 5, 1998) (No. 97-8977). "Because hearsay determinations are particularly fact and case specific," our review of those decisions is especially deferential. Id. Thomas contends that the statements were not sufficiently close in time to the "startling event" (i.e., the officers breaking into the house) to fall within the scope of Rule 803(2). However, there is no bright-line rule restricting the amount of time that can pass between a startling event and an excited utterance; the key factor is whether the declarant is still under the stress of the startling event. See Fed. R. Evid. 803(2) (containing no time element); Fed. R. Evid. 803(2) advisory committee's note; United States v. Farley, 992 F.2d 1122, 1126 (10th Cir. 1993). Here, the district court found that the officers' entry into the house with a battering ram was a startling event. The court determined that Harper was still very upset and had not fully recovered from that event at the time he made the statements. The district court did not abuse its discretion in admitting Harper's statements under Rule 803(2).

Thomas also contends that admitting Harper's hearsay statements violated his Sixth Amendment right to confront witnesses against him.⁽³⁾ A trial court should allow the admission of a hearsay statement against a criminal defendant "only if it bears adequate 'indicia of reliability.'" Ohio v. Roberts, 448 U.S. 56, 66 (1980). "Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." Id. We have previously held that the "excited utterance" exception embodied in Rule 803(2) is a "firmly rooted" exception to the hearsay rule. See United States v. Jackson, 88 F.3d 845, 847 (10th Cir. 1996) (citing White v. Illinois, 502 U.S. 346, 355 n.8 (1992)). Thus, the admission of Harper's excited utterances under Rule 803(2) did not violate Harper's Sixth Amendment right of confrontation.

Thomas argues that Harper's statements were not reliable because they tended to exculpate Harper and incriminate Thomas. Cf. Lee v. Illinois, 476 U.S. 530, 541 (1986) (noting that "when one person accuses another of a crime under circumstances in which the declarant stands to gain by inculpating another, the accusation is presumptively suspect"). However, because the hearsay statements at issue here fall within a firmly rooted exception to the hearsay rule, the court properly inferred that the statements were sufficiently reliable to be admitted. See Roberts, 44 U.S. at 66. Therefore, the district court did not err in

stating that the exculpatory nature of Harper's statements would go only to the weight to be given them by the jury.

3. Sentencing for Crack Cocaine

Thomas contends that he should have been sentenced for powder cocaine rather than for crack cocaine (which carries a heavier penalty) because the government failed to prove that the substance involved was crack cocaine. Because he did not raise this issue at trial, we review only for plain error. See United States v. Walker, 137 F.3d 1217, 1219 (10th Cir. 1998) (citing Fed. R. Crim. P. 52(b)).

We find no error here. Two forensic scientists testified for the government that the substance Epperson bought was crack cocaine. The defendant offered no evidence to rebut that testimony. The district court did not commit plain error in sentencing for crack cocaine.

4. Constitutionality of Sentencing Guidelines' Disparate Treatment of Crack and Powder Cocaine

Next, Thomas asserts that the disparity in the sentencing provisions for crack cocaine and powder cocaine is unconstitutional. See U.S. Sentencing Guidelines Manual (U.S.S.G.) § 2D1.1(c) (drug table) (1995⁽⁴⁾) (treating one gram of crack as equivalent of 100 grams of powder cocaine for sentencing purposes). Thomas argues that the harsher penalties for crack cocaine disproportionately affect black defendants in violation of the Constitution. Although the defendant does not cite to a specific provision of the Constitution, we assume he intends to bring his argument under the Equal Protection and Due Process clauses of the Fourteenth Amendment, as have other defendants. See, e.g., United States v. Ashley, 26 F.3d 1008, 1013 (10th Cir. 1994).

Thomas failed to raise this issue below, so we review for plain error. See Walker, 137 F.3d at 1219. We have repeatedly rejected claims that section 2D1.1(c) violates the constitutional guarantees of equal protection and due process. See, e.g., Ashley, 26 F.3d at 1013; United States v. Thurmond, 7 F.3d 947, 950-53 (10th Cir. 1993). Thus, we reject Thomas's attack on the constitutionality of section 2D1.1.

5. Recusal

Finally, the defendant argues that the district court judge should have recused himself from sentencing. Specifically, Thomas argues that certain comments made by the judge to the jury after they returned their verdict demonstrated the judge's bias against the defendant. Thomas filed a motion for recusal after those comments, which the district court denied. We review the denial of that motion for abuse of discretion. See Cauthon v. Rogers, 116 F.3d 1334, 1336 (10th Cir. 1997).

The district court judge made the following comments to the jury:

This trial has really involved you through a large picture window view of a sad part of our society, one that has many, many victims and one that involves enormous cost, not the least of which is simply the trial that we went through and the investigation and the effort and production of the people here in court to provide their testimony, and the fact that we have this . . . illegal industry, the scourge on the public that is traveling across this country where drugs are -- illegal drugs are imported and sold on the street.

R.O.A. vol. 8 at 8.

"Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455(a). The court must ask "whether a reasonable person, knowing all the relevant facts, would harbor doubts about the judge's impartiality." United States v. Cooley, 1 F.3d 985, 993 (10th Cir. 1993) (citation and internal quotation marks omitted). We agree with the district court and the government that the statements quoted above amount to no more than what "Congress was saying to all of us when it passed these [drug] laws," R.O.A. vol 9 at 19 (comments of district court at sentencing)--i.e., that drug use and drug dealing are significant problems in the United States. These statements do not demonstrate partiality. The district court did not abuse its discretion in denying the motion to recuse.

Conclusion

For the reasons stated above, we AFFIRM the jury's verdict and the sentence imposed upon the defendant.

ENTERED FOR THE COURT,

Deanell Reece Tacha

Circuit Judge

FOOTNOTES

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^{*}This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

¹During a subsequent search of the premises, the police recovered a gun from the defendant. The gun recovered was a chrome nine millimeter handgun rather than a black .45. We will discuss this apparent conflict in the evidence in more detail below.

²Many defendants recently have challenged their convictions in light of Bailey v. United States, 516 U.S. 137 (1995), which addressed the meaning of the "use" prong of section 924(c). However, Thomas's trial was held after Bailey was decided and he does not challenge the "use" instructions given to the jury in his case.

³The hearsay rule and the confrontation clause address similar concerns. They are not, however, identical rules. See, e.g., Fed. R. Evid. Article VIII advisory committee notes. Therefore, we analyze the two issues separately.

⁴As a general rule, we refer to the version of the guidelines that was in effect at the time of the defendant's sentencing. See United States v. Moudy, 132 F.3d 618, 620 n.1 (10th Cir.), cert. denied, 118 S. Ct. 1334 (1998).

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UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JUDE T. AKINS,

Defendant-Appellant.

JUL 8 1998

No. 97-3353

PATRICK FISHER

Clerk

(D.C. No. 97-CR-40010)

(District of Kansas)

ORDER AND JUDGMENT(*)

Before EBEL, HENRY, and BRISCOE, Circuit Judges.

INTRODUCTION

In February 1997, a grand jury entered a one-count indictment charging Jude T. Akins, a convicted felon, with violating 18 U.S.C. § 922(g) by possessing a firearm. At trial, over Mr. Akins's objection, the district court admitted testimony from two police officers and from Ms. Lissie Purenell that on December 29, 1996, Evelyn Culpepper and her children told them that Mr. Akins had threatened Ms. Culpepper with a pair of guns earlier that night. The jury subsequently found Mr. Akins guilty as charged. Mr. Akins now appeals that conviction, arguing that the district court erred by admitting the testimony of the police officers and Ms. Purenell. Because the district court did not abuse its discretion when it admitted this testimony, we affirm Mr. Akins's conviction.

DISCUSSION

"Evidentiary decisions rest within the sound discretion of the trial court, and we review those decisions only for an abuse of discretion." United States v. Tome, 61 F.3d 1446, 1449 (10th Cir. 1995). Moreover, "[o]ur review is especially deferential when the challenged ruling concerns the admissibility of evidence that is allegedly hearsay." Id.

The district court admitted each of the challenged statements under Fed. R. Ev. 803(2), the excited utterance exception to the hearsay rule. Rule 803(2) allows admission of "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Thus, a statement is admissible as an excited utterance when:

1. a startling event occurs;
2. the declarant makes a statement while under the stress and excitement caused by the event; and
3. the statement relates to the startling event.

See id.; United States v. Zizzo, 120 F.3d 1338, 1355 (7th Cir.), cert. denied, 118 S. Ct. 566 (1997); see also Cole v. Tansy, 926 F.2d 955, 958 (10th Cir. 1991) (utilizing the same three-pronged test to determine whether statement constituted an excited utterance under New Mexico rules of evidence). Thus, we must examine whether the statements of Ms. Culpepper and her children pass muster under Rule 803(2).

1. A Startling Event Occurred

Ms. Purenell testified that on the night of December 29, 1996, she witnessed Mr. Akins choking Ms. Culpepper. *Apl't's App. vol. II*, at 37-38, 44, 51. This attack certainly qualifies as a startling event with respect to Ms. Culpepper. However, because Ms. Purenell's testimony is equivocal as to whether Ms. Culpepper's children witnessed this attack, see id. at 38, we must look elsewhere to see if the children experienced any other startling event that night.

However, we need not look far to find such an event. At trial, Sergeant Craig Fox testified that when he arrived at Ms. Purenell's home (the scene of the altercation between Mr. Akins and Ms. Culpepper), Ms. Culpepper's oldest child told him that Mr. Akins had been carrying a pair of guns and had threatened to shoot Ms. Culpepper. See id. at 95. Ms. Purenell also testified that at least two of Ms. Culpepper's other three children made similar statements to the police. See id. at 45. And we have no doubt that a child who has witnessed someone threatening to shoot his mother has experienced a startling event.

Mr. Akins contends that we cannot rely on the children's statements to establish that a startling event occurred because there is nothing to corroborate the children's version of the events. However, Mr. Akins ignores the fact that the children's statements were, in fact, corroborated by the police's subsequent discovery of a pair of guns in a nearby tree. See id. at 68-72. Moreover, their version of events is further supported by Ms. Purenell's testimony that she witnessed a violent confrontation between Mr. Akins and Ms. Culpepper and by Sergeant Fox's testimony that the children appeared to be frightened when he arrived on the scene. Thus, we need not reach the question of whether uncorroborated statements, without more, may prove the occurrence of a startling event for Rule 803(2) purposes.

II. The Declarants Were Under The Stress Of A Startling Event When They Made Their Statements

Mr. Akins next argues that neither Ms. Culpepper nor her children made their declarations while they were "under the stress of excitement caused by the event." Fed. R. Evid. 803(2). In particular, he suggests that too much time passed between the confrontation and the declarations for those declarations to qualify as excited utterances under Rule 803(2).

As a threshold matter, we note that the government introduced ample evidence to support the district court's conclusion that at the time Ms. Culpepper and her children made their statements, they were still under the stress of the excitement caused by confrontation between Mr. Akins and Ms. Culpepper. For instance, Sergeant Fox testified that at the time Ms. Culpepper spoke with him, "[s]he was very visibly shaken, she was trembling, almost crying as she spoke to me, [and] had a look and a sound of fear in her voice." *Apl't's App. vol. II*, at 92; see also id. at 43 ("[s]he was scared"), 60 ("she appeared to be nervous and scared"), 101 ([s]he was still shaken up"). Similarly, both Sergeant Fox and Ms. Culpepper testified that at the time the Culpepper children made their statements, they appeared to be "scared." See id. at 40-43, 94; see also id. at 61, 63 (describing children's demeanor as "excited"). Mr. Akins offered no evidence to contradict any of this testimony.

It is not clear how much time passed between the confrontation and when Ms. Culpepper and her children made their statements. However, the record does establish that both Ms. Culpepper and her children made their statements after the police had arrived on the scene. See, e.g., id. at 45, 63-64, 93. Officer Howard Montalvo, the only police officer who testified regarding this issue, stated that he arrived approximately fifteen to twenty minutes after he received the call from the dispatcher. *Id.* at 58. And by the time Officer Montalvo arrived, several other police officers, including Sergeant Fox (the only other officer who testified at trial regarding the statements of Ms. Culpepper and her children) were already on the scene. *Id.* Thus, even were we to assume that: (1) several minutes passed between the time Ms. Purenell summoned the police and the time the dispatcher called Officer Montalvo; (2) a full twenty minutes passed between the call and the time that Officer Montalvo arrived; and (3) Ms. Culpepper and her children did not make their statements to Officer Montalvo and Sergeant Fox until several minutes after Officer Montalvo's arrival, this would mean that less than an hour elapsed between the confrontation and the time that Ms. Culpepper and her children made their statements.

We have previously stated that "lapse of time does not necessarily negative the existence of an excited state." Garcia v. Watkins, 604 F.2d 1297, 1300 (10th Cir. 1979). Thus, we have held that so long as the evidence demonstrated that a declarant made an out-of-court statement while still under the stress of a startling event, that statement was admissible as an excited utterance notwithstanding the fact that the declarant made the statement nine hours, see United States v. Rosetta, 1997 WL 651027, at **2 (10th Cir. Oct. 20, 1997), or even a full day, see United States v. Farley, 992 F.2d 1122, 1126 (10th Cir. 1993), after the startling event. Consequently, the fact that an hour may have elapsed between the confrontation and the time that Ms. Culpepper and her children made their statements will not remove those statements from purview of Rule 803(2), since the unrefuted evidence demonstrates that Ms. Culpepper and her children were still experiencing the stress and excitement caused by the confrontation at the time they made their statements.

III. The Declarations Related To A Startling Event

The final requirement for admission under Rule 803(2) is that the out-of-court statement must "relat[e] to a startling event." Fed. R. Evid. 803(2). The statements of Ms. Culpepper and her children easily clear this hurdle, as all of those statements related to the confrontation between Mr. Akins and Ms. Culpepper. See Aplt's Brief at 7-8.

Mr. Akins also offers a last, novel argument: that the district court should have excluded the testimony of Ms. Purenell and the two police officers because at trial these witnesses did not directly quote Ms. Culpepper and her children but, rather, only paraphrased their statements. However, Rule 803(2) does not require witnesses to have photographic memories. Thus, we will not exclude the testimony of Ms. Purenell and the police two officers merely because these witnesses did not quote Ms. Culpepper and her children verbatim.

CONCLUSION

In sum, the district court did not abuse its discretion when it admitted the testimony of Ms. Purenell, Sergeant Fox, and Officer Montalvo regarding the out-of-court statements of Ms. Culpepper and her children. And although neither Ms. Culpepper nor her children were available to testify at trial, because the district court acted within its discretion in admitting the testimony regarding their out-of-court statements, the admission of this testimony did not run afoul of either the Fifth or Sixth Amendment. See, e.g., Haskell v. United States Dep't of Agric., 930 F.2d 816, 820 (10th Cir. 1991) (holding that the district court did not violate a party's due process or confrontation rights when it admitted business records that were co-authored by an individual who was unavailable to testify at trial). Accordingly, we hereby AFFIRM the judgment of the district court.

Entered for the Court,




Robert H. Henry

Circuit Judge

FOOTNOTES

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